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No. 95-

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

NANCY WHITE VENCIL AS TRUSTEE OF THE TRUST OF C.A. WHITE AND FLO. B. WHITE, AND BRENDA WHITE VICK, NANCY WHITE VENCIL, AND GEORGE R. WHITE, INDIVIDUALLY,

Petitioners,

vs.

[KEITH B. QUIGLEY, AS] PRESIDENT JUDGE, COURT OF COMMON PLEAS, 41ST JUDICIAL DISTRICT, JUNIATA AND PERRY COUNTIES, ORPHAN'S COURT DIVISION,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Petitioners seek a Writ of Mandamus against the Respondent, in his capacity as President Judge of the Court of Common Pleas, requiring him to issue rulings and/or determinations on petitions, motions, and appeals long pending before his Court. The Pennsylvania Supreme Court denied, in per curiam opinions, a Complaint in Mandamus (together with a Complaint in Intervention), and a Petition for Reconsideration of the Mandamus Complaint (together with a Complaint in intervention).

The Questions Presented are:

1. Whether the Respondent, in failing to issue rulings and/or determinations on the various petitions, motions, and appeals before his Court violated the Petitioners' rights to "procedural" and "constitutional due process" under the 5th and 14th Amendments to the U.S. Constitution.

2. Whether private property rights of individuals are protected by "constitutional due process" under the 5th and 14th Amendments to the U.S. Constitution, when a state denies "full evidentiary hearings", in matters against other private individuals (that takes away private property rights), that do not involve state or federal funds or benefits.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiff and Intervening Petitioners in the court below):

Plaintiff, Nancy White Vencil, Trustee of the C.A. and Flo B. White Trust.

Intervening Petitioners, Brenda White Vick, Nancy White Vencil, and George R. White, individually, as beneficiaries of the C.A. And Flo. B. White Trust.

Respondent (Defendant in the court below):

The Honorable Keith B. Quigley, as President Judge, of the Court of Common Pleas, Orphan's Court, 41st Judicial District, Commonwealth of Pennsylvania.

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OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania concerning the Mandamus Complaint and Complaint in Intervention is set forth in Appendix A and is not reported.

In so doing, the Supreme Court of Pennsylvania issued a joint decision on the Mandamus Complaint and the Complaint in Intervention, as more fully described in the third paragraph on page 8 of this Petition For Writ of Certiorari.

The decision of the Supreme Court of Pennsylvania concerning the Petition for Reconsideration is set forth in Appendix B and is not reported. Likewise, this decision concerned all of the Petitioners, who joined in the original Mandamus Complaint.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Pennsylvania denying the Petition for Reconsideration of the Mandamus Complaint was entered on March 19, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. ss 1257 (a).

In addition, this Court is authorized, pursuant to 28 U.S.C. ss 1651 (a) to issue all writs (including mandamus), necessary or appropriate in all of its jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are the Fifth Amendment, United States Constitution; the Four-tenth Amendment, Section 1, United States Constitution; and 28 U.S.C. ss 1651(a). These provisions are set forth in Appendix C.

STATEMENT OF THE CASE

1. Nature of the Controversy

This case involves a complex inter vivos trust settled by the Petitioners' grandparents in late 1965 to preserve valuable family owned timberland, as well as cash assets, in order to properly manage

these assets and pass them on to the beneficiaries, the Petitioners herein (hereinafter referred to as the Non-Consenting Beneficiaries). and other issue of the Settlors (hereinafter referred to as the Consenting Beneficiaries)[1]. The Trust has been involved in litigation in the Respondent's Court since the early 1980's. During the past nine years the Respondent has continuously failed to issue rulings and/or determinations on numerous motions, petitions and appeals before his Court. The failure to issue a determination on the most important of these has resulted in the denial of the Petitioners rights to "full evidentiary hearings" in which to present and prove a surcharge claim, involving more than a million dollars, against the Consenting Beneficiaries for their unwarranted litigation against the Trustees over the past sixteen years period. This is in complete denial of the Petitioners' "due process rights". He even states on the second page of his Memorandum of June 30, 1995, accompanying his Order of the same date, (a copy of which is set forth in Appendix D and is not reported), that perhaps some of his actions might be "even in violation of due process".

The basic controversy is whether the Respondent as a duly appointed judicial official of the State of Pennsylvania can by his actions and inactions fail to hold "full evidentiary hearings" and/or to issue determinations thereon, thereby denying constitutional "due process" to the Petitioners herein.

2. Summary of Facts

The original Trustees of the Trust were one of the Settlors ("C. A. White"), the Juniata Valley Bank (the "Bank"), the Settlor's two sons, Raymond E. White ("Raymond") and J. Nevin White ("Nevin"), and his son-in- law, the late Roy A. Wingate ("Roy"). All of the original Trustees are no longer Trustees (having either resigned or died), with Nancy White Vencil ("Nancy"), the daughter of

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1 The term Consenting Beneficiaries is utilized (as it was in the proceedings before the Orphan's Court to refer to those beneficiaries who either filed a petition to remove Raymond as a Trustee or filed exceptions to the 1986 and 1992 accountings. Likewise, the term Non-Consenting Beneficiaries refers to those Trust Beneficiaries who did not approve of the Consenting Beneficiaries litigation against the Trust and its Trustees.

Raymond (and herself a beneficiary), being the sole present trustee, whose appointment was confirmed by the Orphan's Court.

The Trust Agreement granted the Trustees broad discretionary powers, allowing them complete freedom to deal with the Trust assets without the permission of any Court.

Since the inception of the Trust, and throughout the entire period of the Trust's administration, there were always conflicts in investment philosophies between the four family (individual) Trustees, who were professional lumbermen and the one corporate Trustee (the Bank). Raymond was an astute and successful businessman, who proposed that the Trust make various investments, and had his proposals been invested in, the Trust's assets would have been greatly enhanced.

The Bank (for self-serving reasons coupled with a lack of adequate knowledge concerning Raymond's Proposed investments, used its one vote to veto these profitable investments.

In addition, the Bank, due to its lack of experience in the lumber industry, hindered the everyday operations of the Trust's substantial timber ground assets, to which these actions caused the Trust to lose vast sums of money. Accordingly, Raymond and Nevin sought the Bank's resignation as a Trustee.

Two of the Consenting Beneficiaries, unaware of the real facts as to why the Bank was resigning, filed a Petition with the Orphan's Court, in the Spring of 1980, to stop the Bank from resigning, and instead erroneously requested that Raymond resign as a Trustee. A year later, the Orphan's Court denied this Petition. This decision was upheld by the Pennsylvania Supreme Court in November, 1984.

During the interim from 1981 to 1985, the remaining Consenting Beneficiaries who were not involved in the appeal of the Orphan's Court order of 1981, embarked upon costly and unsuccessful litigation against the Trustees in an attempt to prematurely gain control of their trust assets.

In November of 1986, the Trustees filed an accounting. The Consenting Beneficiaries responded with two sets of unsubstantiated exceptions. The Respondent appointed an Auditor, Daniel Stern,

Esq., to oversee these exceptions.

The Auditor needlessly allowed undue time to elapse prior to setting hearings, and between hearings, and the exceptions were never fully disposed of until 1994, seven years after their filing. Rulings on these closed issues are still pending, even though the Petitioners have repeatedly re-quested the Respondent for rulings.

Largely due to the fact that the Respondent has continually refused to oversee the Auditor and/or expedite these matters to a timely close, the Trust was not able to terminate on it's original termination date of March 21, 1992. The Trustees filed another accounting encompassing the period from the 1986 accounting through July 1, 1992 (the 1992 accounting) in hopes of finally terminating the Trust, even though the Auditor never fully addressed the exceptions to the 1986 accounting.

The Consenting Beneficiaries responded to this account with the usual frivolous exceptions, and the Respondent again appointed the Auditor to oversee these exceptions also. The Auditor, as he did in 1987, failed to dismiss these exceptions for lack of "offer of proof". This action cause the Trust to sustain massive costs in needless litigation expenditures.

In an attempt to stop the Consenting Beneficiaries unwarranted 12 year litigation, the Non-Consenting Beneficiaries and the prior Trustee filed motions, etc. on November 4, 1992 and December 16, 1993 (respectively) to hold (surcharge) the Consenting Beneficiaries responsible for the losses to the Trust, etc., that were caused by their unwarranted litigation.

The Court appointed Auditor Stern to hear all these matters, the exceptions to the 1986 and 1992 accountings, the Trustee's Motion to Surcharge Beneficiaries, and the prior Trustee's Request for Fees being that he was forced to serve as Trustee 2 years past the original Trust termination date without compensation.

When the Petitioners complained to the Respondent concerning the Auditor's improper actions during the nine years of his appointment, the Respondent ignored these complaints and a Motion to Dismiss the Auditor for Cause and attached Memorandum of Law accompanying a Motion for full evidentiary hearings (App. E.), that cited to 101 documented allegations of the Auditor's misconduct, as

alleged in the Mandamus Complaint (App. F-4).

The Auditor and the Respondent denied rulings on the closed issues (the Consenting Beneficiaries exceptions to the 1986 and 1992 accounts and the prior Trustee's Request for Fees) and a request for a Court Docket (necessary to support the Petitioners' surcharge claim) being that no official Court Docket exists from 1980 through 1993, (App. F-5).

In addition in the spring of 1993, the Respondent allowed the Auditor to remove all of the existing Court Records pertaining to the Trust litigation from the Courthouse and keep them in his sole possession for close to three years. The Petitioners are without knowledge as to whether these records have yet been returned to the Courthouse. When the Respondent was asked to see that the records were returned to the Courthouse and to provide a Court Docket thereon, he refused to do so.

On January 18, 1995, the present Trustee filed a Motion (with the Respondent) requesting rulings on the closed issues prior to addressing the Petitioners' surcharge claim being that these issues were precedent and relative to many of the costs, damages, etc. that they were seeking. The Respondent never ruled on these matters and the Auditor required the Petitioners to attend a surcharge hearing on January 25, 1995 regardless of this fact. In this hearing, little was accomplished, for the majority of the two hour hearing was spent in discussing procedural matters (the lack of a Court Docket and rulings on the closed issues). Only a half hour was afforded to address the lengthy surcharge claim involving 15 years of unwarranted litigation by the Consenting Beneficiaries.

At the end of that hearing, the Auditor denied the Petitioners further evidentiary hearings and set an unrealistic time frame for these parties to present materials and briefs thereon. This fact clearly violates the Petitioners' "due process" rights, to an opportunity to confront and cross examine witnesses in support of their surcharge claim. 12 *In Re Buchman's Estate,* 3 Ca. 2d 546,267 P 2d 73,84 (Dist. App. 2d, Div.3 1954). Appeals to the Auditor and the Respondent on this matter were to no avail.

On March 22, 1995, the Auditor filed a Motion for payment of his fees and expenses. Before the twenty days (under Rule 3.2 (a), Pa. Orp. Ct. R.) had elapsed in which any party could file an Answer,

the Respondent ordered the Trustee to pay the fees. When the Trustee protested, by formal exception, due to the Auditor's misconduct that had caused greater financial losses to the Trust than the fees that he was seeking, the Respondent, without a hearing, ordered the Trustee to make payment within ten days or risk contempt of Court.

The Trustee, under protest, paid the funds into an escrow account of the Court to be dispersed upon the decision of a final appeal on this matter. The Respondent, regardless of this fact, ordered the Clerk of the Court to pay over the funds to the Auditor in violation of P. R. C. P., Rule 1522. In so doing, he violated state procedural statues, the terms of the escrow account, and took away Trust property without "due process" of law.

Shortly thereafter, the Trustee, filed a Petition asking for a hearing on this matter. To date, the Respondent has neither granted the hearing nor ruled on this Petition, thereby denying the Trustee access to any appeal of the payment of the Auditor's fees. *Steccone v. Morse Products Co.*,191 F. 2d 197, 199 (9th Cir. 1951), once again denying her " due process of law ".

On June 27, 1995, the Trustee filed a Motion For Full Evidentiary Hearings on the Surcharge Issues (coupled with a Memorandum of Law and a Notice to Plead) , a Motion to Dismiss the Auditor for Cause (coupled with a Memorandum of Law and Notice to Plead), and a motion for rulings on all motions previously pending motions before the Respondent and hearings thereon.

On June 30, 1995, three days after the numerous Motions, Memorandums, Exhibits, etc. listed above had been filed, and before the twenty days had elapsed under Rule 3.2 (a) of the Pa. Orp. Ct. R. in which the Auditor or any other interested party could respond, and irrespective of the specific Notices to Plead pursuant to Rules 1026 and 1361 of the Pa. R. C. P., the Defendant signed an Order, together with a Memorandum of Law and Letter to the Clerk of the Orphan's Court, (App. D), stating that the Auditor would continue to oversee these matters and that the Petitioners surcharge claim would be handled by deposition only, once again clearly viol-acing Pennsylvania procedural law and denying the Petitioners their rights of "due process". It should be noted that the Respondent allowed the Consenting Beneficiaries numerous hearings to address their unsubstantiated exceptions. Further-more, the Respondent deferred rulings on these very serious matters until the biased Auditor (whose

removal based upon 101 documented allegations of negligence, ineptitude, pre-judices, and misconduct had been sought) issued his Report.

On the second page of his Memorandum of June 30, 1995, the Defendant states that while it is true that the Judge has made some rulings that some folks might consider "from the hip" or precipitous or perhaps "even in violation of due process". This flies in the face of the numerous U.S. Supreme Court cases cited to the Respondent in the Memorandum accompanying the motion for full evidentiary hearings, which included *Goldberg v. Kelly*, 397 US. 254, 90 S. Ct. 1011, 25 L. Ed. 287 (1970), that held that "procedural due process" once denied may not later be obtained.

Furthermore, the Respondent indicated that he did not read the lengthy documented motions, memorandums, exhibits, etc. submitted to him on June 27, 1995. If he had only taken the time to do so, the importance of evidentiary hearings and rulings thereon would have been clearly evident to him.

After that point, papers were submitted to the Court that asked the Respondent to recuse himself from the case based upon his total disregard to effectively handle the numerous matters that had been pending since 1987. In the last paragraph of apparently the second page (the pages being unnumbered) of his Memorandum of June 30, 1995 (App. D), the Respondent states that very possibly the proceedings should be conducted by an assigned Senior Judge, but that this was up to the Pennsylvania A. O. P. C. and can not be assured. Query why didn't the Respondent seek possible assignment of a new judge from the Pennsylvania A. O. P. C., in the interests of justice, rather than issuing his "shoot from the hip order", for "justice delayed is justice denied"? *Commwealth v. Keenan*, 347 Pa. 574, 33 A. 2d 244 (1943).

3. Proceedings Below.

A. Appeal to Pennsylvania Supreme Court, Nature of Action, and Basis for Jurisdiction.

On October 13, 1995, the trustee [prior to the October 15, 1995 deadline stated in the Respondent's Order of June 30, 1995, for the completion date of Depositions (App. D)], the Trustee filed a

Complaint (App. E), seeking a Writ of Mandamus, with the Pennsylvania Supreme Court, well within the six month period running from the date of the Defendant's Order for commencing original actions against the Commonwealth of Pennsylvania or a governmental unit pursuant to 42 P.C.S.A. ss 5522 (b) (1); *Township of Bensalem v. Moore,* 620 A. 2d 76, 80, 152 Cmwlth 540 (1933). Jurisdiction was properly in the Supreme Court of Pennsylvania as there was no appeal or other actions pending in any Pennsylvania lower appellate Court. *Com. ex rel. Specter v. Dennis,* 10 Pa. Cmwlth 439, 308 A. 2d (1973); and *Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia City,* 507 Pa. 194, 489 a. 2d. 1286 (1985).

The Plaintiff, as Trustee of the Trust, had standing to bring mandamus against a public official, as her interests were distinct from those which she shared with the general public. *Dumbroski v. City of Philadelphia,* 431 Pa. 199, 209, 245 A. 2d. 238, 244 (1968).

Brenda, Nancy, and George in their individual capacities filed a Petition to Intervene in Mandamus Complaint (App. G), and a Complaint in Intervention (App. H), both dated before the November 15, 1995 due date for briefs to be filed, stated in the Respondent's Order of June 30, 1995.

B. The Constitutional Claim

The Mandamus Complaint (E-15-16)stated that the Defendant had failed to issue rulings and or determinations in eight instances (accompanied by explanation and case authorities), in violation of procedural and substantive due process rights under the fifth and fourteenth amendments to the United States Constitution:

(1) Ruling on the Motion for Full Evidentiary Hearings on the Petitioners' surcharge claim and offer of proof thereon;

(2) Ruling on the Motion to Dismiss the Auditor for Cause;

(3) Ruling on the closed issues of the Consenting Beneficiaries exceptions to 1986 and 1992 accountings and the prior Trustee's request for fees;

(4) Ruling on the request for a Proper Court Docket;

(5) Ruling on the Exceptions to the Petition for payment of Auditor's fees;

(6) Appeal of Extension of Time to file material with Auditor;

(7) Rulings on the timeliness of opposing counsel's reply to the former Trustee's surcharge motion, and other matters; and

(8) Rulings on the lack of reply by opposing counsel to the Trustee's Memorandum of law with regard to his request for fees.

The Mandamus Complaint stated (App. E-19) that under Pennsylvania law the right to Mandamus exists when (a) the act to be performed is a clear legal right or a mandatory duty (b) there exists in the Plaintiff a clear legal right, (c) a corresponding duty in the Defendant, and (d) want of any other adequate and appropriate remedy. *Philadelphia Newspapers Inc v. Jerome*, 478 Pa 484, 387 A. 2 d. 425, 430 (1978). It then showed how these requirements were met in this case.

As to (a) it showed that although mandamus is an extraordinary remedy, under Pennsylvania case law a writ of mandamus may be utilized to procure the enforcement of a public duty or compel a judge of inferior jurisdiction to perform his duties. *Commonwealth v. Keenan,* supra 33 A. 2d at 249 et seq.

Concerning (b) it demonstrated that the Petitioners as litigants before the Respondent's Court were owed a duty under law to have their case heard. The U.S. Supreme Court has consistently held that when parties are denied access to an effective court process they lose their right to "due process", *Boddie v. Connecticut,* 401 U.S. 373 (1971).

As to (c) there is a corresponding duty incumbent upon a judge to rule on all matters before his Court. *Commonwealth v. Keenan*, supra, and this extends to motions as well. In *Re School Asbestos Litigation,* 997 F. 2d 764, 770 (3d Cir 1992).

Concerning (d), mandamus is the only remedy avail-able for there has been no final appealable order issued by the Defendant. *Steccone v. Morse Products Co.*, supra at 199.

C. Relief Sought

The relief requested of this Court as well, as the relief sought from the Court below, was that of the granting of a writ of mandamus. Although there is not complete diversity of citizenship among the thirteen beneficiaries of the Trust, many of the beneficiaries reside in states other than Pennsylvania. As was pointed out by this Court in *McLellan v. Carland*, 217 U.S. 268, 281 (1910), the chancery jurisdiction of the federal courts has been co-extensive with that of the state courts concerning estates (or trusts), where citizens of different states are involved in litigation, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England. Therefore, where the state has failed to recognize the federal principles of "due process" under law, it falls to this Court to uphold these rights.

The Petitioners sought a Writ of Mandamus from the Pennsylvania Supreme Court ordering the Defendant to perform his statutory duty as a judge under the laws of the State of Pennsylvania to afford full evidentiary hearings, and issue rulings and/or determinations thereon in the eight instances noted under section B above.

They also sought recusal of the Respondent from the proceedings and the appointment of a new trier of the facts to hear the case.

D. Rulings of Pennsylvania Supreme Court

On January 10, 1996, the Pennsylvania Supreme Court issued an order granting an Application for admission Pro Hac Vice and the request to intervene, and denying an Application for Stay, the Complaint in Mandamus, and the Complaint in Intervention (App. A). The order also stated that the Judge's name should be stricken from the caption, without any reason being given.

On January 17, 1996, the Petitioners filed a Petition for Reconsideration of the Court's Order of the 10th of January, 1996 with the Pennsylvania Supreme Court (App. I).

On March 18, 1996, the Pennsylvania Supreme Court issued an Order denying the Petition for Rehearing. (App. B)

E. Proceedings before the United States Court of Appeals for the 3d Circuit.

A Mandamus Complaint was filed with the Third Circuit Court of Appeals on May 21, 1996 (App. J).

By Order entered on June 4, 1996 (App. K) the Third Circuit dismissed the Mandamus Complaint (apparently due to lack of jurisdiction).

The Petition is being filed, within the 90 day period after the final judgement of the Pennsylvania Supreme Court, under section 1 of U.S. Sup. Ct. Rule 13, and in compliance with U.S. Sup. Ct. Rule 20 and 28 U.S. C. ss. 1651 (a), regarding the requirements for filing a Petition for a Writ of Mandamus.

REASONS FOR GRANTING THE WRIT OF CERTIORARI AND MANDAMUS

I. THIS CASE HAS PROFOUND IMPLICATIONS IN PROTECTING CONSTITUTIONAL DUE PROCESS OF LAW FROM INFRINGEMENT BY STATE COURTS IN DISPUTES CONCERNING PRIVATE PROPERTY.

The actions of the Defendant and the Court appointed Auditor raise an overriding constitutional issue that transcends this case and this Judge; i.e. one that will become increasingly more apparent as government continues to enlarge its functions and its regulation of private interests. It is whether a state through the actions of its Courts can take away "procedural due process rights" to a hearing in a private matter involving private parties (and thus their rights to private property), where a state is not denying a party the benefit of public funds or other benefits of a public nature.

In failing to consider the Mandamus Complaint (together with the Complaint In Intervention), and the Petition for Reconsideration (App. I), which discussed this overriding constitutional issue in detail, the Pennsylvania Supreme Court chose not to deal with the very serious question of the deprivation of private property rights by a state without full "due process of law". It had been pointed out, in several Court papers embodying memorandums of law (App. I), to the Respondent, as well as the Pennsylvania

Supreme Court, that two states, California (in an actual appellate Court decision, and Montana in dicta in a Supreme Court decision, have held that the State can not deny "procedural due process rights" to a hearing, in strictly private property matters, *In Re Buchman's Estate* ,supra, and *In Re French's Estate,* 137 Mt. 347, 351 P. 2d. 548 (1960). In both of the above cited cases, the appellate courts held that in failing to grant adequate hearings to an executor of an estate "procedural due process" had been violated.

In failing to consider the Mandamus Complaint and Petition for Reconsideration, the Pennsylvania Supreme Court ignored a line of decisions by this Court in which it clearly stated that the rights of individual private citizens to "procedural and substantive due process" must be protected by the states, courts, and agencies. While these cases previously involved situations where the state was either denying money benefits or other state benefits to its citizens[2], these cases (as the decisions in the *Buchman's* and *French's* cases should), should be equally applicable to private property rights of a purely private nature.

Accordingly, two states have already considered this question and unequivocally stated that federal "procedural due process" (as enunciated in *Golberg v. Kelly*, supra), can not be infringed upon the states or its instrumentalities in denying fundamental rights under the fifth and fourteenth amendments to the right of a full and adequate

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2 In *Goldberg v. Kelly,* 397 U.S. 254 (1970) this Court held that "procedural due process" had been denied unless a predetermination hearing in which the petitioner could present evidence, orally testify, confront, and/or cross examine witnesses was held before the Petitioner's rights to a federally assisted program to aid families with dependent children (administered by the State of New York and local government), were terminated. Likewise, in *Boddie v. Connecticut,* supra, this Court held that welfare recipients by being unable to pay court fees and costs for service of process in divorce cases were denied effective access to the Courts and " due process". *In Daniels v. Williams*, 474 U.S. 327 (1976), this Court stated that a prisoner was deprived of " substantive due process" when the State used certain arbitrary procedures which caused his injury. The Defendant's procedures are quote arbitrary.

trial, before any property rights are taken away. In *Re Buchman's Estate,* supra, and In *Re French's Estate,* supra.

As we approach the twenty-first century, governments (both state and federal) have become more and more involved in regulating our business and private lives in a highly complex technical society. Private citizens, of necessity, have been required to surrender a degree of control of their lives to the government. Implicit in this degree of control of our private lives is the necessity that all of the constitutional safeguards of our republic, to citizens of states, are protected by the state. A free society produces conflicts, and these conflicts must be resolved under law by our Courts. Although the Courts are faced with an enormous burden of criminal litigation, they can not and should not be allowed to dismiss difficult and complex civil matters by failing to act. For them to do so defies constitutional "due process of law".

This Court should hear this case and set guidelines for the Courts to apply in hearing civil disputes of this nature. Although the rights of minority and disadvantaged economic classes should be protected by the Courts, it is equally important that the "due process" rights of ordinary citizens be protected by this Court also. "Due process of law" does not only apply to protect the right of welfare mothers, as in the *Goldberg* case, supra, but it applies to the substantial property rights of the Petitioners herein.

II. THIS COURT HAS JURISDICTION TO HEAR THIS CASE AND GRANT THE REQUESTED RELIEF.

Pursuant to 28 U.S.C. ss 1257, final judgements or decrees by the highest court of a State in which a decision could be heard may be reviewed by the United States Supreme Court where any title, right, privilege, or immunity is claimed under the Constitution, treaties, or statutes of the United States.

Both the Complaint In Mandamus (together with the Complaint In Intervention), and the Petition For Reconsideration raised substantial issues of the Respondents violation of the Petitioners rights to "due process" under both the Fifth and Fourteenth Amendments to the United States Constitution (App. B). Accordingly, this Court has jurisdiction to hear this case.

In addition, this Court is authorized under the "All Writs Act", 28 U.S.C. ss 1651 (a), to issue all writs (including mandamus) necessary or appropriate in all of its jurisdiction. This statute codifies existing case law. *Ex Parte Pennsylvania,* 137 U.S. 451 (1890). Therefore, this Court can issue the request relief.

III. THE PETITIONERS MET THE REQUISITES FOR THE GRANTING OF A WRIT OF MANDAMUS BY THE PENNSYLVANIA SUPREME COURT AND WERE DENIED DUE PROCESS OF LAW BY THAT COURT IN FAILING TO GRANT THE WRIT.

Pursuant to Pennsylvania law (as noted above) the right of mandamus exists when (a) the act to be performed is a ministerial act or mandatory duty, when (b) there exists in the Plaintiff a clear legal right where (c) there exists a corresponding duty in the Defendant, and (d) want of any other adequate and appropriate remedy. *Philadelphia Newspapers v. Jerome,* supra, 387 A. 2d at 430.

In *Commonwealth v. Keenan,* supra, the Pennsylvania Supreme Court held that the act of a judge in ruling upon cases is a mandatory duty under Pennsylvania law [see also *Goodman v. Meade*, 162 Pa. 587, 60 A 2d 577 (1948)]. Federal Case law has held that this duty extends to motions as well. *In Re School Asbestos Litigation, supra.*

While in *Philadelphia Newspaper v. Jerome,* supra, the Pennsylvania Supreme Court did not find that the Plaintiff had a clear legal right to open access to a pre-trial hearing (for his rights had to be balanced against the criminal defendant's rights to a fair trial), in our case, to the contrary, it is the Petitioner's clear constitutional right of "procedural due process" under the fifth and fourteenth amendments to the Constitution that prevents the state from taking away rights and further rights to private property, to present and confront witnesses at an adequate open hearing. In addition, the Respondent has taken away these rights and further rights to private property, by his failure to rule. Likewise, where parties are denied access to effective Court process they lose their due process rights. *Boddie v. Connecticut,* supra.

In this case, the Petitioners herein had specific well defined legal rights to enforce; i.e. the right to have the customary and

necessary Court Docket, necessary rulings on the closed issues, and full evidentiary hearings to protect their "due process rights".

There is an absence of an adequate legal remedy, for if the hearings on the surcharge issue are not held now, "just-ice delayed may be justice denied", due to possible death or incapacity of witnesses, as the history of this case indicates that witnesses have died or been incapacitated, and hence mandamus is appropriate.[3] *Sewell v. Solomon,* 77 Pa Cmwlth. 199, 465 A. 2d 130 (1983).

In the case at issue, mandamus is sought to compel, not control the use of discretion by the Respondent. *In Hotel Casey Co. v. Ross,* 343 Pa. 573, 23 A. 2d 737, 742 (1942), (the Pennsylvania Supreme Court stated:

> "Although the writ is granted by the law side of the Court, equitable principles largely govern its issuance and it will be granted *only where necessary to promote the ends of justice and where the prayer of the petitioner appeals to the conscience of the Court".* [Emphasis added].

In this case it is submitted that justice has not been served by the actions of the Respondent by refusing to literally have anything to do with this involved case after the 1980- 1981 hearings (the Consenting Beneficiaries' litigation against the Trustees).

Instead, he entrusted the case to a predisposed and unqualified Auditor whom he refused to supervise, and who exceeded both his mandate from the Court and areas traditionally delegated to

---

3 As noted above, Roy Wingate, one of the former trustees (who was a lumberman and had full knowledge of the litigation and devastating financial effects of this litigation), is deceased. In addition, Eugene Palm, a surveyor and forester (having full knowledge of the extent of loss of timber due to the Consenting Beneficiaries' ongoing litigation) has been permanently disabled by an accident, and is not capable of testifying. The two remaining original Trustees, Nevin and Raymond White, are both over 65 years of age. Due to present and potential health problems, they may not be available for testimony years from now.

an Auditor, ruling on many legal issues that were reserved to the Court. This Court has held that a lower Court, such as the Respondent's, does not have the authority to delegate these duties to the Auditor, and further, that he should have supervised the Auditor's activities. *Field and Others v. Holland and Others,* 10 U.S. 8 (1810).

The *Keenan* case, supra, presented to the Pennsylvania Supreme Court an almost identical case, involving the failure of the President Judge of the Court of Common Pleas of Westmoreland County for failing to fulfil his judicial mandate and rule on matters before his Court; some of which had been pending before his Court for less time than many of the issues in our case. Moreover, the Respondent in his June 30, 1995 Order (App. D) made it clear that he had no intention on ruling until some indefinite future date, if then.

This Court in the *Keenan* case, id, 33 A 2d at 249, citing to Article I ss 11 of the Pennsylvania State Constitution, further held that justice delayed may be justice denied", for it may prejudice or deny a suitor's rights. This provision restates section 40 of the Magna Carta (1215 A.D.) which provides: "To none will we sell, to none will we *deny* or *delay* right of *justice*." (Emphasis added)

The fact that the right to have justice administered without delay is a fundamental right that should not be infringed upon unless no other course is reasonably possible was reaffirmed by the Pennsylvania Supreme Court in *Exton Drive In. v. Home Indemnity Co.*,436 Pa. 48, 261. A. 2d. 319. (1970); cert. den. 400. U.S. 819.

This Court went on to state in the *Keenan* case, id. 33 A. 2d. at 244:

"The *failure* of a *judge to perform promptly* the *duties of his position*, unless he is prevented from doing so by substantial illness or by other circumstances over which he has no control, is one of the *most grave breaches* of that *fidelity* which *every official owes* to the *sovereignty* he is *chosen to serve*." [Emphasis added].

Judge Keenan stated that his ill health prevented him from hearing the cases, but supplied no evidence as to the nature of his health, and the Court apparently did not believe that this defense was

meritorious.[4]

In the case at issue, the Respondent has refused to perform his duties, but like Judge Keenan, does not specify as to how many other more important cases, or other pressing court business, is preventing him from carrying out the duties that *(1) he was elected to perform; (2) took an oath to perform; and (3) which he was paid to perform.*

The Petitioners did not ask the Pennsylvania Supreme Court to decide the difficult substantive and procedural issues submitted, only to issue mandamus so that these matters could at least move forward, since the Respondent refused to ad-equality deal with them. Accordingly, there would at least be an appealable issue, which is better than the current situation of stalemating these issues for over a nine year period. By denying mandamus, the Pennsylvania Supreme Court denied the Petitioners their day in Court, and perhaps forever.

If ever a case compelled the issuance of a writ of mandamus, it is this case. For the Pennsylvania Supreme Court to, in effect, condone the unlawful and unreasonable actions of the Respondent and the Auditor, and to deny mandamus without even as much as an opinion citing to its reasons, is a manifest denial of justice. This is a long and complex case and a fully structured decision by the Pennsylvania Supreme Court would have been helpful in bringing this matter to a prompt and just closure. Furthermore, the Respondent and the Auditor chose not to answer the Mandamus Complaint or cite to any legal authorities to support their positions; and, neither did the Pennsylvania Supreme Court cite to any legal authorities to support their denial.

The Fifth amendment together with the Fourteenth Amendment, Section 1, United States Constitution (App. C), provide that no person shall be deprived of property by a state without "due process of law". By failing to even consider the Mandamus

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4 On page 249 of the *Keenan* case, the Court stated "*** We adjudge the illness pleaded to *be of such a self inflicted nature* as to afford *no excuse* whatsoever for the *pleader's failure to perform* the *duties* which he was *elected to perform*, which he *took* an *oath* to *perform*, and which he is *paid to perform*" [Emphasis added]

Complaint (together with the Complaint In Intervention) and the Petition for Reconsideration, the Pennsylvania Supreme Court, like the Respondent, effectively denied the Petitioners access to the Court system and thereby deprived them of their constitutional "due process rights".

IV. THE PETITIONERS MEET THE REQUISITES OF BEING GRANTED A WRIT OF MANDAMUS UNDER FEDERAL LAW.

While section 1651 (a) of the U.S.C. grants authority to this Court to issue a writ of mandamus in all appropriate circumstances, Supreme Court Rule 20 states that the writ of mandamus under 28 U.S.C. ss. 1651 (a) will only be issued if it is (1) in aid of the Court's jurisdiction; (2) that exceptional circumstances warrant the exercise of the Court's discretionary powers; and that (3) adequate relief can not be obtained in any other court.

This case involves a substantial federal question; i.e. violation of the Petitioners "due process rights" under the fifth and fourteenth of the United States Constitution and, there-fore, will be in and of the Court's jurisdiction, for this Court is the ultimate authority on all constitutional matters.

Exceptional circumstances warrant the exercise of this Court's discretionary powers or the Consenting Beneficiaries litigation against the Trust will erode the assets of this Trust entirely. The failure of the Respondent to act on this matter has already cost this Trust an excessive amount of money. In short, if these actions are allowed to continue, this litigation will bankrupt the Trust.

The hearings on the surcharge claim should have been held in 1992 when the issue was first presented. It should be noted that this ongoing litigation will not come to an end until the Consenting Beneficiaries are held accountable for their frivolous litigation.

If this Court does not intervene, the Respondent will most likely uphold the predisposed Auditor's Report, even though the Petitioners have not been afforded full evidentiary hearings thereon and the Auditor's Report houses numerous misstatements of fact, law, and Record. In addition, such a ruling will be issued in the absence of a Court Docket and the appropriate rulings on the precedent, closed issues. Accordingly, there will undoubtedly be

appeals, which will only waste even more of the Trust's assets.

At the time that this case is finally remanded by a higher Court, witnesses may no longer be available, the Respondent will be retired, and the Trust bankrupt. Therefore, "due process" will be lost forever.

The above paragraph clearly evidences that the third condition of "no other adequate relief" exists in this case. In addition, there are no means by which any of the motions, appeals, and petitions can be appealed at this time, for there are no final decisions on these nine year old issues. Accordingly, the Petitioners have a clear and indisputable right to a writ of mandamus, as they lack adequate alternative means to obtain the relief that they seek. *P.A.S. v. Travelers Ins. Co.*, 7 F. 3d 349 (C.A. 3d N.J. 1993).

Federal case law has held the there are five guidelines to be balanced in determining whether a petition for writ of mandamus or mandamus jurisdiction will be granted: (1) the party seeking the writ has no other adequate means to attain relief; (2) the Petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the challenged order is clearly erroneous as a matter of law; (4) the Order is an oft-repeated error or manifests persistent disregard of federal rules; and (5) the Order raises new and important issues of law of first impression. *Lee v. City of Beaumont,* 12 F. 3d 933 (1993).

As to the first requisite stated by the Court in the *Lee v. City of Beaumont* case, supra; (that of no other means is available), as has been shown herein, that there is no means of appeal existing at this time, and if this case continues on its present course in the Respondent's Court, it will only lead to eventual dissipation of the entire assets of the Trust. This fact also satisfies the second requisite (that of non-correctable damage of prejudice), for once the assets are dissipated "due process" is gone forever. Furthermore, even assuming that there may be assets three years from now, there can be no assurance that the needed witnesses will be able to testify.

As to requisite number three, the Respondent's actions are clearly erroneous as a matter of law. In *Mallard v. U. S. District Court, 490 U.S. 296 (1989),* in a case in which a district court prevented a court-appointed attorney from resigning due to his lack of experience in the matter involved, this Court held that the Court did not properly exercise its jurisdiction under the applicable federal

statute in appointing him, and, accordingly, mandamus was the only and appropriate remedy. Likewise, in this case under state law, the Respondent had a clear duty to act (not in any specified manner) in the matter before him, and, mandamus lies to require that he rule one way or the other. *In Re Grossmayer,* supra, *Steccone v. Morse Product Co.*, supra; and *Flagship National Bank of Miami v. Testa*, 429 So. 2d 69 (Fla. App. 3 Dist. 1983).[5]

As to the fourth requisite, (that of the error being an often repeated error), while we have no specific knowledge of any pattern of cases in which the Respondent has committed the same error and failed to rule (as this Court had in *La Buy v. Howes Leather Co.*, 352 U. S. 249 (1957)[6], nevertheless we seek mandamus on eight grounds for numerous errors of misconduct by the Respondent committed over a nine year period that have caused substantial financial and emotional losses to the Petitioners herein.

In addition, our case like the *La Buy* case, supra, involves various complex issues of fact and law well within the knowledge and experience of the Respondent. It also contains many matters involving interpretation and rulings of law that should not have been referred to an Auditor. Accordingly, for the Respondent to refer all matters subsequent to 1981 to either a Master, who decided a portion of these matters, or the Auditor, constitutes an abandonment of judicial function to which mandamus is the only appropriate remedy.

As to the fifth necessary element for mandamus to be granted by a federal court (that of the order raising new and important issues of law of first impression), this case involves the question of the abuse by the state of private rights of private individuals in disputes with other private individuals. To our knowledge, this has never been addressed by any federal court or this Court before; and, is an issue

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5 In this case the judge did not rule on several motions, for he felt that a jury trial was preferable to his ruling. The Court found no lawful basis for the Judge's failure to rule, and found mandamus to be the only appropriate remedy, as no appeal was possible 429 So. 2d at 70.

6 Evidence in the record showed a pattern of improper reference on many cases to a special master by the District Judge.

that is ripe for determination by this Court.

This issue has been dealt with by only two state appellate Courts, one in an opinion and the other in dicta. In both cases, executors of an estate were involved, and the appeal was from the equivalent State Court to that of the Respondent's Court. Likewise, in both cases the lower Court judge was overruled and the appellate Court reasserted the denial of "procedural due process" as the basis for its decision.

In the *Buchman's Estate* case supra, the executor appeared in Court on an order to show cause why he should not be removed for alleged misconduct and the failure to file an inventory of the estate within the three month period after his appointment prescribed by law. At the initial hearing, evidence was presented as to the executor's mental condition, and in chambers the Judge attempted to have the executor resign. The executor refused to resign, then, and later, in open Court, after his counsel was dismissed. At a continuation of the hearings, when he was once more represented by newly appointed counsel, the Court refused to admit the executor's "offer of proof" and removed him.

In overruling the trial Court, the California Appellate Court, states, in pertinent part, Id at p.84:

> "The fundamental conception of a Court of justice is condemnation only after notice and hearing. No one may be deprived of anything which is his to enjoy until he shall have been divested thereof by and according to law. Under the constitutional guaranties, no right of an individual, valuable to him pecuniarily or other-wise, can be justly taken away without its being done conformably to principles of justice which afford "due process" of law, unless the law constitutionally otherwise provides. "Due process" of law does not mean according to the whim, caprice, or will of a Judge*****. "The power vested in a Judge is to hear and determine, not to determine without a hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. **"

The case of *In Re French's Estate* case, supra, involved the

question of admission of a holographic will to probate. One of the issues discussed in the dicta of the *French's Estate* case, supra, involved the dismissal of an executor by the Court without a hearing. In the *Buchman's Estate*, case, supra, there was an inadequate hearing, while in the *French's Estate,* case, supra, there was no hearing at all. The reason for the dismissal was the alleged misconduct of the executor, coupled with the failure to file an inventory. Summarily, in the *French's Estate* case, there was a rejected "offer of proof" and the denial of full evidentiary hearings by the lower Court, as is true of our case with Petitioners' Surcharge Claim. In the *Buchman's Estate* case, the was no hearing afforded, as is also true of our case concerning the denial of any evidentiary hearings on the Non-Consenting Beneficiaries' exceptions to the '92 accounting, and the numerous other motions cited to above.

Justice Adar, in the dicta in the *French's Estate* case, 351 P. 2d. id at 595, repeating the language of the *Buchman's* case, supra, states that the Petitioners therein have been denied, their "substantive and procedural due process rights", and hence , their "rights to private property". These rights are afforded under the Constitution, and should not be denied them by the very officers of the Court that have sworn to uphold them.

Although in this case we feel that all five prerequisites for granting mandamus set forth in *Bauman v. United States District Court,* supra, were met, in *Organization For Reform of Marijuana Laws v. Mullen*, 828 F. 2d 536, 542 (9th Cir 1987), the *Bauman* balancing test was narrowed to apply if only three of the prerequisites were met with the most important being those of no other available relief, no way of correcting error in the future, and a unique question being presented to the Court in the case at issue. This case certainly meets those three prerequisites, if not all five of them.

While this Court has held that appellate review should generally be postponed until after judgement has been rendered by the trial *Will v. United States,* 389 U. S. 90, 94 (1967), exceptional circumstances amounting to a judicial "usurpation of power" have caused this Court to grant the extraordinary remedy of mandamus. *De Beers Consol. Mines Ltd. v. United States*, 325 U. S. 212, 217 (1945). While in the *De Beers* case, supra, the federal circuit court issued mandamus because the district court did not have the power to enter an order, the same rationale should apply when a lower court has the power to enter an order but fails to take any action, as in our

case. This was the decision of this Court in *McLellan v. Carland*, supra, where this Court decided that a circuit judge was not justified in staying an action before his Court until the State of South Dakota could bring an action in a state court on an action already essentially decided by the federal district court. This would have caused needless delays.

Likewise, as in our case, the Respondent failed to hear and decide the motions, appeals, and petitions before him and (principally the motion for "full evidentiary hearings"), as did the circuit judge in the *McLellan* case, supra, and accordingly usurped the power of his office by denying the Petitioners hereunder their rights of "due process" in his court.

The federal courts have been very conscious to protect the rights of litigants to due process of law and in so doing have utilized mandamus to disqualify a judge from acting where there has been evidence of his lack of impartiality. *In Re School Asbestos* litigation, supra. In so doing, the third circuit court of appeals held that an interlocutory or final appeal were not the only means for attaining a judge's disqualification.

The Petitioners asked for the judge to recuse himself, for demonstrated bias and lack of performance of his duties, and he declined to do so. In addition, his recusal was sought from the Pennsylvania Supreme Court, who did not consider the Mandamus Complaint. The Respondent in court hearings has demonstrated that he did not wish to hear this case and if required to hear it would not do so in an impartial manner. He, in effect, has refused to hear this case since 1981, and his failure to rule and hold evidentiary hearings is evidence of his denial to perform his duties with regard to this case. Accordingly, mandamus should be utilized to cause his recusal from this case.

V. THE RESPONDENT HAS CONTINUALLY DENIED DUE PROCESS OF LAW TO THE DEFENDANTS.

As demonstrated above by continually failing to rule and/or issue determinations, on matters before him the Respondent, like the Judges in *In Re Buchman's Estate*, supra, and in *In Re French's Estate*, supra, cases has denied "due process of law" to the Petitioners by failing to allow them full evidentiary hearings in which to present their surcharge claims.

VI. THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING THE AVAILABILITY OF JUDICIAL RELIEF NECESSARY TO PRESERVE CONSTITUTIONAL DUE PROCESS RIGHTS.

This case presents to this Court, as the highest court in the United States, the issue of whether a state Court Judge by refusing to rule in private matters regarding private property interests of private litigants can deny them their "due process rights" under the fifth and fourteenth amendments to the U.S. Constitution.

It more importantly presents the issue of whether a judge can dispense with allowing private litigants their day in Court in "full evidentiary hearings". The right to a full and adequate hearing is just as much a right in a civil case involving private property, as in any other case. *In Re Buchman's Estate*, supra, and *In Re French's Estate*, supra.

A. Fashioning Adequate Relief in This Case Does Not Lie Beyond Judicial Competence.

The Petitioners herein request only that this Court issue a writ of mandamus requiring the Respondent, or other Judge appointed in his place, to rule upon the issues before him, as enumerated above. Most importantly, he should issue a determination on the motion before him for "full evidentiary hearings", that denies the Petitioners herein their rights to "due process" under the fifth and fourteenth amendments to the U.S. Constitution.

B. A Present Judicial Remedy Is Required to Preserve the Remaining Assets of the Trust.

The assets of the Trust have been greatly dissipated by the Respondent's actions and will continue to be dissipated unless he is directed to make the necessary determinations on the petitions, motions, and appeals presently before his Court. The course of action adopted by the Respondent will only cause further wasteful litigation, and will bankrupt this Trust.

C. The Constitution Requires An Effective Remedy for Respondent's Constitutional Violations.

The Constitutional safeguard of "due process of law" applicable to the federal government, as stated in the Fifth Amendment to the U.S. Constitution, is made applicable to the states in the fourteenth Amendment to the U.S. Constitution. No person may be deprived of property by a state without "due process of law".

As was pointed out by this honorable Court long ago in *Ex Parte Virginia*, 100 U. S. 339 (1879), there has been no serious question in the history of our republic as to Congress' power to impose criminal sanctions against state judges for constitutional violations. Furthermore, the Congress and this Court have regarded denial of fundamental constitutional rights as being a serious offense that the Courts should and will correct. This case has all the earmarks of such denials. Accordingly, since (as noted above) there is no present right of appeal, the only remedy is mandamus; and, it is submitted that this Court should order it to put a halt to the Respondent's constitutional violations.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted, and the Court should permit the Petitioners to file their brief stating in detail why the decisions of the Pennsylvania Supreme Court should be reversed and this Court issue a Writ of Mandamus requiring the Respondent to issue the requested rulings and determinations.

Respectfully submitted,

LEONARD F. BINDER, ESQ.
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520 Brickell Key Drive,
Suite 0-303(B)
Miami, Florida 33131
(305) 374-0301
COUNSEL OF RECORD

(2)

FILED

No. 96 19 JUN 17 1996

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

NANCY WHITE VENCIL AS TRUSTEE OF THE TRUST OF C.A. WHITE AND FLO. B. WHITE, AND BRENDA WHITE VICK, NANCY WHITE VENCIL, AND GEORGE R. WHITE, INDIVIDUALLY,

Petitioners,

vs.

[KEITH B. QUIGLEY, AS] PRESIDENT JUDGE, COURT OF COMMON PLEAS, 41ST JUDICIAL DISTRICT, JUNIATA AND PERRY COUNTIES, ORPHAN'S COURT DIVISION,

Respondent,

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

THE TRUST OF C.A. AND FLO B. WHITE, BY NANCY WHITE VENCIL AS TRUSTEE,	:	
Petitioner	:	Nos. 135 and 157 M.D.
	:	M.D. Misc Dkt. 1995
v.	:	
	:	
JUDGE KEITH B. QUIGLEY, AS PRESIDENT JUDGE, COURT OF COMMON PLEAS, 41 ST JUDICIAL DISTRICT, JUNIATA AND PERRY COUNTIES, ORPHANS' COURT DIVISION	:	

ORDER

PER CURIAM:

AND NOW, this 10th day of January, 1996, the requests for leave to file, the Application for Admission Pro Hac Vice and the request to intervene are granted. The Application for Stay, the Complaint in Mandamus and the Complaint in Intervention are denied. Judge's name to be stricken from the caption.

DATED: JAN 11, 1996

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

THE TRUST OF C.A. AND FLO B. WHITE, BY NANCY WHITE VENCIL TRUSTEE,	:	
Petitioner	:	Nos. 135 and 157 M.D. Misc. Dkt 1995
v.	:	
PRESIDENT JUDGE, COURT OF COMMON PLEAS, 41 ST JUDICIAL DISTRICT, JUNIATA AND PERRY COUNTIES, ORPHANS' COURT DIVISION	:	

ORDER

PER CURIAM:

AND NOW, this 18th day of March, 1996, the request for leave to file a reply is granted; the Petition for Reconsideration is denied.

DATED: MAR 19, 1996

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jepordy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Fourteenth Amendment, Section 1., United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 28 U.S.C. ss 1651 (a)

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPENDIX D

COURT OF COMMON PLEAS
41st JUDICIAL DISTRICT OF PENNSYLVANIA
Juniata and Perry Counties
(717)582-2131

KEITH B. QUIGLEY
PRESIDENT JUDGE

P.O. Box 668
NEW BLOOMFIELD, PA 17068

JUNE 30, 1995

Mrs. Nancy Lebkicher
Register and Recorder
Juniata County Courthouse
Miffintown, Pa. 17059

Re: Trust of C. A. and
Flo B. White
No. 34-77-67

Dear Mrs. Lebkicher:

I am enclosing a Memorandum and Order in the above matter for filing, copies of which have been forwarded to all persons noted as copied on the within Order.

All parties are advised that the posting date of this letter constitutes notice to them of the docketing of this Order.

This Memorandum and Order gives to the Trustees and possibly others, the opportunity, within a limited period of time, to take and file with the Auditor depositions and argue same before the Auditor.

It should also be noted that any adverse Auditor rulings any adverse Court rulings, or any matters that in the judgement of any parties have not been addressed by the Court, can and will be, as the need arises, addressed by the Court following the filing of the Auditor's Report.

I believe this is a sensible approach to gain some perspective in this matter and I intend to stay with this and to hold

all concerned to the time limitations and procedures involved, barring something in the nature of a writ of prohibition from a superior Court.

If at all possible, barring extraordinary circumstances, this litigation shall cease and be determined early 1996.

Very truly yours,

/s/

Keith B. Quigley

IN RE:	: IN THE COURT OF COMMON PLEAS
	: OF THE 41ST JUDICIAL DISTRICT
TRUST OF	: OF PENNSYLVANIA-
C.A. AND	: JUNIATA COUNTY BRANCH
FLO B. WHITE	: NO: 34-77-67

ORDER

AND NOW, June 30, 1995, in accordance with the within Memorandum, it is Directed that the Auditor continue in such capacity, that the Auditor entertain, by deposition testimony, evidence concerning surcharge proffered by Trustee. Said depositions shall be completed by October 15, 1995, and shall be filed with the Auditor, but not with the Court. Briefs shall be filed with the Auditor by November 15, 1995, and the Auditor shall file a Report with the Court by January 15, 1996. There shall be no oral argument in front of the Auditor. As to any other motions or requests for rulings before the Court at this time, rulings on same are deferred. However, all issues raised or to be raised by the Trustee or by any other party or parties whether addressed or not at this stage, may be reasserted by any appropriate means upon the filing of the Master's Report.

BY THE COURT,

/S/

KEITH B. QUIGLEY, P.J.

IN RE: : IN THE COURT OF COMMON PLEAS
: OF THE 41ST JUDICIAL DISTRICT
TRUST OF : OF PENNSYLVANIA-
C.A. AND : JUNIATA COUNTY BRANCH
FLO B. WHITE : NO: 34-77-67

MEMORANDUM

This Court has before it several recently filed issues concerning the compensation of the Auditor and most recently a request that the Auditor be removed, a Motion for an Evidentiary Hearing, and a Motion for Rulings apparently presently pending somewhere either before the Court or the Auditor.

Approximately four pounds of documents are submitted in support of the requests.

This case has gone on for many years through approximately a platoon of attorneys. Most, but not all of the interested parties have been represented by counsel.

An Auditor was appointed by the Court to help with the myriad issues that have been asserted over the past years. Apparently the Auditor will soon be in a position to render a report.

Most recently, from the Trustee's side of the battlefield, many observations, complaints, motions, etc. have been made; some, in the judgement of the Court, being frivolous and completely without merit, some probably with some merit, and most the Court not being in a position to preliminarily comment.

In the judgement of the Court, finality ought to be achieved and achieved reasonably soon. We are not at all certain that all parties share the desire of the Court to achieve finality, but believe same to be desirable.

The first step toward achieving finality is for the Court to entertain the report of the Auditor. Of course Exceptions can be filed to the Report of the Auditor and, from previous observations and experiences, probably will be.

While it is true that this Judge has made some rulings that some folks might consider to be " from the hip" or precipitous, or

perhaps even in violation of due process, this Court is simply attempting to cause matters to move forward and to not in any manner deprive anyone of asserting his or her rights and positions.

We are going to enter another "shoot from the hip" Order with respect to Mr. Binder's four pound motion, aforesaid, which will in essence direct that all issues either presently existing in the record before the Auditor, existing in the objection to the Auditor's fees and the Court's order with respect to same, existing with respect to the present four pound motion otherwise existing in any way shape or form may either be addressed as per the attached Order or be raised by the vehicle of Exceptions to the Auditor's Report.

The Court suggests that perhaps many of the issues and concerns will be mooted by the recommendation of the Auditor. This Court will, to the extent necessary to get to the bottom of all issues before it, conduct appropriate proceedings either personally or very possibly by an assigned Senior Judge who would have more time than the undersigned to devote to the issues. However, the assignment of a Senior Judge is up to A.O.P.C. and cannot be assured.

In any event, judicial resources, to the extent justified and necessary, will be expended in the event Exceptions to the Report are necessary.

We note that the spectre of Appellate Court intervention has been suggested for the past month or so, but are unaware of any action taken by any Court in the nature of a supersedeas, etc.

By the way of a personal request to all concerned, this Judge respectfully requests that some attempt at the attaining of perspective be undertaken and made by all parties so that at the very least this litigation can become susceptible to control by the Court.

/s/

June 30, 1995 KEITH B. QUIGLEY, P.J.

APPENDIX E

IN RE: TRUST OF C. A. AND FLO B. WHITE : IN THE CIRCUIT COURT OF
: COMMON PLEAS OF
: JUNIATA COUNTY,
: PENNSYLVANIA
: ORPHANS' COURT
: DIVISION
: NO. 34-77-67

MEMORANDUM

The Motion for Full Evidentiary Hearings on the Surcharge Issue and Offer of Proof Regarding Same attached hereto should be granted by the Court based upon the following facts and arguments.

FACTS

This Trust matter has been in litigation for over fifteen (15) years. The causes of the litigation have involved both monetary and non- monetary motives. The Trustee intends to demonstrate to the Court that unfounded family disputes, hatreds, jealousies, and self serving motives by various family members created a pattern of discord that lead to excessive litigation expenses, as well as severe economic loss to the Trust by not allowing the Trustee(s) to remedy natural waste and to take advantage of economic opportunities.

During these years, certain of the Trustee(s) have served as targets upon which the consenting beneficiaries vented their own family problems and frustrations. This resulted in a course of unwarranted and needless litigation to remove the former Trustee. The decision of this Court not to remove the former Trustee was affirmed by the Pennsylvania Supreme Court.

The Trustee(s) were never afforded the opportunity to provide to the Court evidence as to the motives of the surcharged beneficiaries that caused wasting of Trust resources both in the

needless actions for the former Trustee's removal and the wasting of Trust assets caused by natural sources (I. e. the gypsy moth), and loss of business opportunities to the Trust.

The present Court record reflects only the actions that were started with reference to exceptions to the 1986 and 1992 accountings by the surcharged Beneficiaries, not issues of their motives related to the surcharge issue.

In hearings on the 1986 and 1992 accountings the Auditor allowed the surchargeable Beneficiaries (those beneficiaries who sought to surcharge the former Trustees' in the 1986 and 1992 accountings) to render unsupported exceptions without any evidence. At many times in these hearings, the Auditor did not allow the former Trustee to complete his statements that were relative to the surcharged Beneficiaries motives, stating that the matter was "irrelevant" or "immaterial". As will be shown in the discussion of the issues herein, the Perry and Juniata County 41st Judicial District Rules of Court Procedure state that the auditor must allow full hearings, even as to so-called " hearsay", unless the statements fit into certain objected categories which his proposed statements did not, thereby denying him " due process".

In December, 1993, the prior Trustee filed a Motion to Surcharge the participating beneficiaries. This motion followed similar motions filed in October and November, 1992, brought forth by three non- participating beneficiaries that were filed as part of their exceptions to the 1992 accounting. To this date, the Auditor has avoided reviewing the exceptions of the non-participating beneficiaries.

On January 19, 1994, the Court, in approving motions to quash brought by attorney Snelbaker, stayed the Trustees Motion to Surcharge. The stay was not lifted until August 9, 1994, with regard to the surcharge issue, the Trust was hampered by and continues to be hampered by the lack of a complete and accurate Court docket

(" proper court docket") and lack of direction by the Court as to how to effectively address and to present the surcharge issue, in that neither the Auditor nor the Court has ruled on the prior audits which have been completed, nor have aided the Trustee in the formation of a proper Court docket, which does not presently exist. This has been pointed out to no avail in numerous motions and other documents filed with the Auditor and the Court by counsels for the Trustee.

The fact remains that the Trustee (lacking a proper court docket) requested, on three separate occasions, rulings on the closed issues and a Court prepared docket prior to setting any surcharge hearings, and the Auditor, as noted in the attached motion, disregarded these requests and set a hearing on the surcharge issue in December, 1994. Attorney Snelbaker, counsel for certain of the surcharged beneficiaries asked for and was granted a continuance of the hearing.

The Auditor then set a hearing date for January 25, 1995, for 9:30 A. M. for one day only without obtaining the availability of Mr Mirin. Counsel Mirin had a pre-scheduled Court date in Dauphin County at 1:00 P. M. on the 25th, thereby creating a scheduling conflict. The Auditor's oversight regarding this matter, as shown in his scheduling of only one day for a matter that encompasses over twenty (20) years and numerous players shows his complete lack of a basic understanding of the matters involved, as well as a clearly demonstrated bias, for truly a subject of this magnitude will command a week or more of hearings. Clearly, the Trustee's position was jeopardized for the Auditor refused any further evidentiary hearings, and counsel Mirin had a conflict of schedule and could only meet for a portion of that one day hearing.

The Auditor did not accommodate the pre-scheduled conflicts of Mr. Mirin although he abruptly canceled, a day before (to accommodate his own needs), on the second day of the hearings, the third and last day of the hearings held in October, 1993. Both the Trustees' co- counsel and certain of the beneficiaries had traveled over

a thousand miles to attend these hearings. Unnecessary and heated verbal attacks were directed at the current Trustee (who then attended as a beneficiary), and her counsel for finding fault with the Auditor's self serving actions Ms. Vencil suffered an unfortunate miscarriage as a result of the ensuing few days of personal attacks against her by Auditor Stern, including the one cited above.

On January 18, 1995, Mr Mirin filed with the Court a Motion for an Extension of Time, a Court docket and rulings on closed issues that were relative to the surcharge position prior to setting surcharge hearings. Mr. Mirin received a verbal denial from the Court, but the Court did not make it clear to Mr. Mirin that it was denying the continuance only. Immediately, Mr. Mirin contacted all parties and received consent to a continuance. He then made an additional request orally to the Judge for the continuance. Being that all of the attorneys had agreed, the Judge stated that he would consent, but that the Auditor had the final word. The Auditor denied the continuance, knowing full well that all of the parties were not adequately prepared, thus creating a severe handicap for the Trustee and the three non participating beneficiaries, who had filed the surcharge motion.

To date, the Court has not ruled on the remaining issues of the motion of January 18, 1995. The Auditor pressed the hearing of January 25, 1995, a seemingly unreasonable response, and denied in the hearing, the additional request by Trust counsel for rulings on closed issues and a Court prepared Court docket prior to addressing surcharge matters. He did so irrespective of the fact that the Court had not ruled on the similar request in the motion of January 18 1995 beforehand, thereby usurping the authority of the court. For this reason, all parties were not adequately prepared and requested a continuance of the January 25, 1995 hearing. This was denied by the Auditor, irrespective of the fact that the Court had not ruled on the Motion before it .

At the hearing held by the Auditor on January 25, 1995, the Auditor stated that this was the only evidentiary hearing that the

Trustee and the three non-participating beneficiaries would receive on the surcharge issue, irrespective of the fact that he had greatly jeopardized their ability to prepare by forcing them to a hearing two days after the Judge's verbal ruling on a continuance. The Auditor allocated less than three hours of time for testimony covering over two decades of time, involving numerous parties and their testimony (a possible twenty witnesses or more to be called). The hearing did not even afford three hours on the surcharge issue, for a great deal of the time was spent on the issues of rulings and court docket, being that the Clerk of the Orphan's Court does not have a proper court docket (see letter of clerk of court attached hereto as Exhibit " M-2". In addition, due to the shortness of time and the fact that a request for a continuance was pending up until two days before the hearing; there was not adequate time to prepare and to subpoena witnesses, the majority of whom reside out of state.

At the January 25, 1995 hearing the Auditor denied the Trustee's counsel's stating that the records, from the Clerk of the Court (though fragmentary were adequate), request for a court docket and rulings on the closed issues of the 1986 and 1992 audits, and the former Trustee's request for fees, and that he would not presently rule on the 1986 and 1992 closed issues on audits, even though the issues had been closed for six months and were conditions precedent to the presentation of the surcharge issue. His refusals seriously impedes the ability of the Trustee to adequately present and defend the surcharge issue to the Auditor and the Court, thereby jeopardizing their chances for a favorable and just ruling in this court or in an Appellate Court.

The Auditor, then after denying the previously mentioned and most reasonable request of the trust counsel forced the trust counsel to proceed with the surcharge cross-examination, irrespective of the fact that the aforementioned occurrences surrounding this matter had not afforded Trust counsel adequate time to prepare and subpoena crucial witnesses (further evidence of the Auditor's biases). At the insistence of the Auditor, the Trust counsel (although he had raised

at the hearing the question of " lack of due process", which the auditor chose not to deal with), not wishing to forfeit the only opportunity to present evidence on the surcharge claim proceeded with cross-examination, being that the Auditor had refused all further evidentiary hearings. Hence such cross-examination can not be construed as a waiver of any " due process " rights of the Trustee.

At the conclusion of the January 25, 1995 hearing, the Auditor, without full knowledge of the Judge's ruling on the motion of January 18, 1995, issued a memorandum stating that the Trustee, within forty five (45) days would provide an accurate and full accounting of all surcharge costs, losses, and damages, relatives to the surcharge issue.

The Trust counsel followed thereafter with the filing of an exception to and request for extension of time to this memorandum, once he had received the Judges order regarding the Motion of January 18, 1995 in which, the request for rulings on the closed issues and a proper court docket were not addressed; and filed with the motion various letters by the Trust experts stating that forty five days was not adequate time for them to finalize their reports and compile the surcharge costs, damages, etc. The Auditor denied this motion also: Query whether the current Trustee who has so vigorously complained (with just cause) about the Auditor's needless delays and oversights in this eight year litigation fiasco is now unduly hurrying these matter along to the point that the Trustee's "due process" is vehemently being denied and is forcing her to make requests for much needed time to adequately prepare present and defend her claims; thus, making her now seemingly the individual responsible for delays.

The Trustee contends that the Auditor's action are deliberate and biased and that he is blatantly attempting to shift the focus of blame for delays upon her, wherein the true blame rests squarely upon his shoulders.

The Trustee's Motion to Surcharge of December, 1993, was

modified by the present Trustee in February, 1995. The court has given no formal or informal acceptance of this modification; nor has it instructed the Trustee with regard to the need for amendment. Opposing counsel filed on January 24, 1995 (the day before the scheduled hearing), an untimely response to the original surcharge Motion of December, 1993, citing latches and the statue of limitations to which the Trust counsel promptly responded with a Reply and a Memorandum of Law in February, 1995. To date, neither the Auditor nor the court has ruled on these issues. The Trust counsels through memoranda, correspondence, and motions have repeatedly cited these court irregularities, and the Auditor and the Court has continually evaded responding to these issues.

On March 22, 1995, the Auditor issued an Order and attached Memorandum of Law (see Exhibit M-2 attached hereto and made a part hereof), denying a Motion by the trustee's counsel for an extension of time (stated in a previously issued Auditors' Memorandum apparently dated January 30, 1995) in which to provide information to the Auditor with regard to the surcharge costs, damages, etc., even though the Trustee's counsel had demonstrated that it was impossible to comply with the deadline set therein. In addition, the Auditor's Memorandum fixing the deadline dates was ambiguous as to the date the time period began to run for compliance (stating two dates January 25, 1995 and January 30, 1995). The only enlightened statement of the Auditor's March, 1995, Memorandum was the last line that clarified that January 30, 1995, was the applicable running date. This, once again, indicates the ineptness of the Auditor, and the " denial of due process", for if the Trustee could not be granted adequate time in which to present her evidence and foreclosed if she did not present it in the time frame, only taking into consideration the needs of the Auditor (who after eight year of delay on the entire trust matters now wanted to end things as soon as possible, apparently due to the Trustee's correspondence to the Court citing the Auditor's past delays and negligence over this eight (8) year period), this would be an inconsiderable, arbitrary use of his powers.

On March 22, 1995, the Auditor filed with the Court a Motion for Payment of Auditor's fees, On April 11, 1995, within the 20 day period prescribed by law for the filing of an Answer to a motion, counsels for the Trustee filed an Answer to the Motion (the " Answer "), [a copy of which is attached hereto as Exhibit "A"], citing that due to the negligence and biases of the Auditor which have caused severe financial losses to the Trust, the Trustee questioned the worthiness of his fees.

Pursuant to paragraph 9 on page 6 of the Answer, the Trustee (due to the fact that substantial property rights were effected) requested a hearing before the Court ruled on the surcharge issue presented; so that she would not be deprived of both " procedural and substantive due process".

In the interim, the Court had signed an Order on March 27, 1995 (the " Order") which, although filed with the Clerk of the Court on the 30th of March, 1995, had not been sent to the parties, by mail by the Clerk's office, until more than thirty days after the order was signed and filed [see letter to Clerk of the Orphan's Court dated May 5, 1995, attached hereto as Exhibit "B" to Exhibit " B", Petition for Withdrawal and Rehearing of Proposed Order of March 27, 1995, Approving Payment of Auditor 's Fees (the " Petition") described in the following paragraph].

The Petition; filed on May 11, 1995 (a copy of which is attached hereto as Exhibit "B") asked for a withdrawal of the Order in that the Court had issued it before having the Answer before it to consider and for a rehearing; and a hearing before the Court, before the Court ruled on the Motion. Once again the Petition, in paragraph 5, on page 3, raised the issue of possible denial of both "procedural and substantive due process".

The Court, on May 16, 1995, on the same day the Petition was filed, issued an Order accompanied by a Memorandum, both dated the 16th of May , 1995, (hereinafter referred to as the "May 16,

1995 Order" and " May 16, 1995 Motion") denying the Petition in its entirety and approving the payment of the Auditor's fees, under the Auditor's Motion of April 1, 1995, asking approval of the Court for such payment (copies of the " May 16, 1995 Order" and " May 16, 1995 Memorandum" are attached hereto as Exhibit "C".)

On unnumbered page 2 of the Order of May 16, 1995, the Court based its decision on the fact that the Auditor is a quasi judicial official, and that the Court has never heard of a situation where an Auditor's Fees are questioned, stating that, for to do so would be similar to complaining concerning the overhead of the Court." The Court goes on to say that this is not to suggest that some authority may not exist on the issue of the Auditor's fees.

Primarily, it should be noted that the learned Court may be mistaken as to the historical nature of Auditor' s office and functions, which will be dealt with extensively in the discussion below. Suffice it to say that while it is true that the Auditor acts as an official of the Court in a quasi - judicial capacity, he is not per se a Court official under a fixed salary, like federal hearing examiners in the U. S. Court of Claims and U. S. Tax Court, who are officials of Courts empowered by statute to hold evidentiary hearings. Their salaries are fixed and the litigants do not pay their fees or any additional amounts for their services.

However, the Trustee's counsels' will filing herewith, within the thirty (30) day maximum [from the entry of the May 16, 1995 Order on May 18, 1995 (the date of notice to the parties effective upon mailing)] statutory period prescribed by section 1522 of the Pennsylvania Rules of Civil Procedure, a Motion for a Second Rehearing, citing to Pennsylvania case law concerning payments to Auditor. In this regard, it will cite to cases, including the case of In re Wilburn's Estate, 334 PA. 45, 5 A. 2d 325 (1939), in which the Pennsylvania Supreme Court states that in determining the Auditor's fee in proceedings on exceptions to the Trustee's account , the amount of, the character, volume of work done, nature and difficulty of

questions involved, time required and similar elements are to be considered. Obviously, it is not automatic and can be questioned. In that case, the Court fixed the fee, *not the Auditor*, based upon the litigating parties assessment of the value of his services. Furthermore, the actions and inactions of the Auditor have resulted in needless and excessive litigation and related expenditures to the Trust which could have been avoided. The Trustee is very critical of this fact and as a fiduciary is extremely concerned with these needless expenditures, which are currently being made and will continue, if the Auditor is allowed by this Court to preside in this matter.

In the interim. while the Motion for a second rehearing is pending, the Trustee, in order to avail any possible charge of contempt of Court (although her working funds are extremely low) has paid the Auditor's requested fees into the escrow account of the Clerk of the Court, pending the outcome of any Second Motion for a Rehearing, and any possible appeals thereof to the Superior Court, should the Court not grant the Motion for a Second Rehearing based upon case law shown to the Court. By letter dated May 26, 1995, (a copy of which is attached hereto as Exhibit " D"), the Trustee, *under protest*, paid the Auditor's fees into the escrow account of the Court, subject to the conditions that the fees not be paid out of the escrow account until either released by the Trustee or the Court after the last appeal. However, the Court contrary to applicable Court Procedure has completely ignored the conditions of the escrow deposit and by order and letter dated June 8, 1995, (copies of which are attached hereto as Exhibit) ordered the Clerk of the Court to immediately issue a check to the Auditor. Counsel for the Trust intends to file a request for a stay of this order, with the Superior Court.

In order to substantiate the surcharge claim, the Trustee intends to introduce the testimony of numerous experts. The Auditor in his denial of the Trustee's motion for extension of time with regard to the surcharge costs, losses and damages totally ignored the letters sent to him by the various experts requesting much needed and

additional time in preparing and compiling accurate information, crucial in supporting the surcharge claims.

These surcharge amounts, in and of themselves are so complex and extensive, not to mention the endless files of petitions necessary to show cause for these lost revenues, over the last few decades.

The presentation of the above evidence to the Court will show that the waste caused by the surcharged beneficiaries' action may be in excess of the present value of the Trust's assets. It can not be told in three hours , or even three days, but will probably involve two weeks of testimony and hearings to cover twenty years of motives, waste, and lost economic opportunities. The Auditor claims that this has been brought before the Court previously; but it has not.

Primarily, during the years that these matters have been in controversy, one of the former Trustees, Roy Wingate, and his wife Ester Wingate have died. In addition, Eugene Palm, a forester and surveyor familiar with these matters for many years, has become permanently disabled and is unable to testify. The files held by a former Trustee, the Juniata Valley Bank (the " Bank") are not now available to the Trustee, due to apparent loss or refusal of the Bank to now turn them over to the present Trustee. To not now allow full evidentiary hearings may deny " due process " forever, as more witnesses may die, become unable to testify or move beyond the jurisdiction of the Court; and/or files become unavailable, loss or otherwise.

OFFER AND PROOF

The Trustee at full evidentiary hearings intends to proffer to the Court or an Auditor the following witnesses and evidence to substantiate her claims:

(1) Expert witnesses as to the value of the timber loss caused

by the gypsy moth infestation, due to the fact that the former Trustees were hindered by the actions of the surcharged beneficiaries, (both in and out of Court), and , therefore, could not act at the proper time to cut the damaged timber and avoid the losses;

(2) Testimony as to the actions of the Bank Trustee and the Court failing to approve the original Centre County subdivision proposed by a former Trustee, Roy Wingate, which after considerable delay, caused by the Bank Trustee and surcharged beneficiaries, was eventually approved by the Court some seventeen years (17) later, as set forth in the original proposal, this delay allowed considerable damage (caused by infestations of gypsy moth) to the Trust property and the remaining three properties not owned by the Trust, thereby causing needless losses to all parties.

(3) Expert witnesses, supported by charts and/ or graphs, demonstrating the losses in revenues to the Trust by a the former Bank Trustee supported by surcharged beneficiaries, refusing to follow the profitable investment plans of the former Trustee, Raymond E. White . This testimony will show that had this advice been followed, the Trust could have a possible cash value today of double or triple its current value.

(4) In addition, it will be shown that the investments recommended by the former Bank Trustee in many cases proved to be unprofitable endeavors. This testimony has never been brought before the Court. It will be shown that the Bank Trustee's economic judgement was <u>far inferior</u> to that of Raymond E. White.

(5) Testimony of the non-participating beneficiaries and other parties as to their knowledge of the family history that ignited the self serving, unfounded, malicious motives of the surcharged beneficiaries in acting in such a manner as to cause diminutions in value of the Trust assets. It will be shown that these litigating actions of the surcharged beneficiaries was in <u>strong opposition</u> to the wishes of the non participating beneficiaries, whose Trust and personal

assets have sustained undue and excessive loss, as a result thereof.

(6) Examination and cross examination of the surcharged beneficiaries with regard to their actions and motives, implicit to showing that non-monetary; and self serving motives founded on petty family hatreds, not factual evidence of the prior Trustee's wrongdoing, have caused monetary diminution in value of Trust asset.

(7) Evidence through testimony of expert(s) , as to how the delayed Court division of the Centre County tract caused the Trust to receive a far lesser share (in value) of timberland. Evidence as to how the overall turmoil created by Court actions and by constant threat of litigation (harassment) by the surcharged beneficiaries impeded the former Trustee from adequately challenging this division;

(8) Evidence as to the prior Bank Trustee's motives that lead to diminution in value of the trust's assets and the direct promoting of family disharmony, thereby igniting this fifteen (15) year litigation fiasco.

(9) Evidence as to the actions and counter-actions of the former Trustee, Raymond E. White, to protect Trust assets, often causing diminution in value of his own assets; and to the detriment of his own profitable business endeavors.

(10) Evidence that the surcharged beneficiaries have not made attempts to become totally apprised of the facts (testimonies of prior hearings and matters relating to the Trust litigation) and in so doing have fostered continuing litigation and misconceptions. These parties need to be present and will be subpoenaed to attend the hearings, since their testimony as to these matters is crucial for a proper determination.

(11) Evidence that several settlement attempts have been

made by the prior Trustee and the non participating beneficiaries to resolve these matters, and that these attempts were continually met with unreasonable and self serving demands on the part of the surcharged beneficiaries. It will be shown that the present and prior Trustee(s) have sought to terminate the Trust (which should by its own terms have been terminated as to all beneficiaries in the spring of 1992). It will be demonstrated that unless the surcharged beneficiaries are held accountable for the losses as a result of their frivolous litigation that their motives for litigating will most probably not change, and thereby their continuous outpouring of exceptions and objections will erode the Trust's assets in its entirety (a point which has been made to them on previous occasions, but appears to have eluded their consciousness and/or belief.

(12) In addition, evidence will be presented as to how the prior Trustees and the non participating beneficiaries endeavored to enlighten the surcharged parties as to the facts surrounding the litigation issues. Evidence as to how their complete disregard of any and all communications and their contemptuous attitude regarding the advice, and subsequent legal actions that they brought fueled by this contempt, prevented a realization of the consequence of their acts.

The Trustee hopes that if the surcharged beneficiaries, who have not heretofore been present in the majority of the hearings, are subpoenaed and thereby made to testify and attend the hearings, they will become enlightened to the truth, and thereby end this hopeless litigation, and open the door to a long overdue Trust termination.

(13) Evidence will be presented as to the evolvement of their family members who are not beneficiaries, who have directly aided and abetted in fueling this fifteen (15) year litigation battle, in order to further their own self- serving motives.

As has been pointed out above, although only three of twenty or more above witnesses have testified before the Court and/or the Auditor in the past, their testimony has been very limited

in nature and not relative to the surcharge issue. The majority of players in this matter have yet to take the stand nor be present at the hearings. Other witnesses; particularly the experts and non participating beneficiaries have never testified before the Court and/or the Auditor in this case.

As will be demonstrated in the discussion of the Issues below, this Memorandum will demonstrate to the Court that the Auditor, in denying full evidentiary hearings, was usurping the authority formerly resting with the Chancellor; i.e. the Court; and, in so doing, denied both fundamental procedural and substantive due process to the Trustees, as well as the non participating beneficiaries and the prior Trustee.

Accordingly, the Trustee requests that this Court, based on the above Offer of Proof, order "full evidentiary hearings" to protect the substantial due process rights as Trustee in the Trust property, as well as the non participating beneficiaries and prior Trustee. It is also respectfully requested that the Court rules on the remaining agenda; i. e. the January 18, 1995 Motion due to the critical nature of these issues with relation to the surcharge claim and further evidentiary hearings.

ISSUES

I. Did the auditor abuse his mandate from the Court and, accordingly, did not have the right to make a legal determination to deny " full evidentiary hearings" ?

II. In denying " full evidentiary hearings" is the Trustee being denied " substantive " and " procedural due process " ?

ISSUES AND LEGAL DISCUSSION

I. Intertwined in this discussion are the issues of usurping of the powers of the Chancellor (i.e. the Court) by the Auditor and

its effect upon the denial of both "substantive" and "procedural due process" to the Trustee. The Trustee, in the discussion of issue I, will demonstrate to the Court that the Auditor has so abused the powers traditionally given to an Auditor that these abuses have literally cut off all rights to a fair and impartial hearing and then in the discussion of issue II that he has thereby prevented "due process" of any kind. In acting as an official of the Court, he has clearly demonstrated bias, and, accordingly, has so distorted his functions that valuable property rights have been taken away from the Trustee and non participating beneficiaries in violation of their constitutionally protected rights.

Primarily, the Trustee will present historical background of Trust law and how the duties of the " Auditor " arose and what his powers were meant to cover, and what they were not meant to cover.

The origin and functions of a Trust are well described in the New York State King's County Surrogates Court case of In re Coutt's Will , 260 N. Y. 128, 183 N. E. 200 140 Misc. Rep 93, 85 ALR. 160, (1932), (a copy of which is attached hereto as Exhibit "E"). This case is not presented for its legal holdings, except as they relate to the various parties to a Trust[1].

In describing the evolution of the Trust concept, the Court states, in pertinent part, on pages 793 and 794:

"The historical development of the modern doctrine of trust furnishes

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1 The prime issue presented in the Coutt's, case, supra, was whether triple commissions were due to the Trustees on three successive Trusts. The New York Surrogates Court held that only bookkeeping entries were required of the Trustees, and, accordingly, only one Trustee's commission was due. However, in reaching its holding as to the conclusions of the trusts, the New York Surrogates Court clarifies the history and positions of parties to a Trust.

an interesting study. The device had its inception in the early days of the Roman Empire, and resulted from the then existing legal rule that a testator could not direct the devolution of his property beyond the first taker, who was held to receive an absolute fee in the subject-matter of the gift. Therefore, if the testator desired that a second person should receive a benefit therefrom, he was obliged to place his confidence or trust in the good faith of the primary beneficiary[2] who could not be held legally accountable, although the third person might have a moral claim upon him. The Emperor Augustus directed the consuls to use their power to enforce these moral rights, and these powers later devolved upon a special officer known as fidei commisarius.

This system continued through the civil law, and was engrafted on common-law jurisprudence through the ecclesiastical courts and their successors, the chancellors and courts of equity. By this means, in cases which later received statutory recognition, the person in whom the trust or confidence was reposed was compelled to employ the property in the manner and for the objects desired by its original owner. He was forced not to betray the confidence which he had undertaken, and to hold, employ, and distribute it according to the directions to which he had expressly or by implication given his assent. It followed that this trust or confidence did not escape from equitable cognizance until the task resting in conscience, as distinguished from strict legal obligations, was completed, and the relationship of the ultimate taker to the property in question again became one of strict legal cognizance.

[3, 4] Under the modern, as well as the historical, doctrine, therefore, a trust arises where the legal and equitable or beneficial

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2 This was a civil law concept, as the trust as we know it was not known in the civil law. It should not be construed to mean that a present day common law beneficiary can not be held accountable for his or her actions.

interests in specific property are vested in different individuals or sets of individuals. This may occur either by will or agreement, or by operation of law. The relationship has its inception when such separation of the legal and equitable interests takes place, and terminates only when they are completely reunited" (Emphasis added)

Therefore, as noted above, the legal concept of a Trust evolved from the early days of the Roman Empire through the civil law and was embodied in common-law jurisprudence through the ecclesiastical courts and their successors, the Chancellors and Courts of Equity.

As the law evolved, the power of the equity courts and the Chancellor increased with the Chancellor being embodied with the duty to decide controversies by doing equity to all parties. This power to determine the law could not and was not capable of delegation to an other (i.e. an Auditor), unless all of the parties to a dispute chose to do so; and even then their were certain duties of the Chancellor that could not be delegated. This is well illustrated almost two hundred years ago in the post colonial U. S. Supreme Court case of Field and Others v. Holland and others, 10 U.S. 8, 3 L. Ed. 136 (1810),. [a copy of which, due to difficulty of obtaining it (as the West's Supreme Court Reports, stated in 1882) is attached hereto as Exhibit "F"]. On occasion, an Auditor was appointed, by the Chancellor, to aid the Court in reviewing accounts.

In the Field case, supra in a Case involving a question of fraud and collusion on the possible part of a sheriff and others after satisfaction of judgements involving real property, Auditors were appointed by the Georgia Court. The Auditors had reported that judgements had been satisfied, but had not shown that any specific payments had been made,

The U.S. Supreme Court on page 18, holds, in pertinent part:
"The first Auditors exceeded their authority; they were only authorized to do a ministered act, but they assumed to act judicially."

They had been asked to examine the accounts and report specifically as to the amounts satisfied on the judgements involved. They apparently made a judicial statement that the accounts had been satisfied (i.e. a legal conclusion).

Chief Justice John Marshall goes on to state on page 25: "In this case it might, perhaps, have been more satisfactory had the parties been permitted to lay all their claims and all their objections before Auditors, so that the precise points of difference between them, and the testimony upon those points, might be brought in a single view before the court." (Emphasis added)

The U. S. Supreme Court was stating that the scope of the Auditor's duties are fixed by the Court and by the parties. Where, as the Trustee shall show, in the case at issue, the scope of the Auditor's function is not given to decide the matter, he can not do so. The scope of the Auditor, (as she should show) is to " examine and report " not to " rule". In our case the Auditor has refused to examine a vast amount of the necessary evidence needed to support the surcharge claim.

Chief Justice Marshall then goes on to further state on page 25:

" But it is to be observed that two orders of reference had before been made, on neither of which was a satisfactory report obtained. That an issue had been directed, which had, for several terms, remained untried. The probability is, that the controversy depended less on items than on principles, and that all parties were desirous of obtaining from the courts a decision of those principles. That no debits nor credits were claimed but those which were stated in the papers, and that all parties wished the opinion of the court on the effect and application of those items. Under such circumstances, a judge would feel much difficulty in withholding his opinion."
[Emphasis added].

The above illustrates that where, as in our case, the parties are looking for a legal decision, they are looking for the Court, not the Auditor to rule. This is the holding of the Marshall Court, when the Court states above (in somewhat archaic English) that: " Under such circumstances, a judge would feel much difficulty in withholding his opinion."

In the mid eighteen hundreds case of John D. Locke and Another vs. Alanson Bennett, 61 Mass. 445, 7 Cush. 445, (1852), [a copy of which is attached hereto as Exhibit " G"], the Massachusetts's Appellate Court examines the function of an auditor of an account between parties, and states at the bottom of page 446 that the office of Auditor is one of great antiquity in the common law going back to the days of Henry III in England.

Originally, the issues of fact and law were presented to the Auditor in formal pleading and then certified to the Court. The Court would then either allow the auditor to try the issues or award judgement. This was done before the Auditor could proceed to examine vouchers.

However, as noted by the Court on page 447 of the Locke case, supra, , the action of account only applied to certain classes of accounts, and where there were mutual accounts to be adjusted this could only be adjudicated in the Chancery Courts.

The Courts of Chancery (the courts of equity) took jurisdiction in cases of accounts, for the remedy in ordinary courts of law was inadequate and, therefore, unsuccessful.

In the case at issue, the basic matter involves accounts and, hence, they are properly before the equity arm of the Court.

The Court in the Locke case, id page 448 goes on to state that the course of accounts in Chancery, has always been to refer the

matter to one or more masters to take the accounts, unless they were of " a very weighty measure", such as in our case where they not only involved the actual accounts but modern day concepts such as surcharge, trustee's fee, etc.

The above quoted words come directly from the time of Lord Bacon, whose order on the subject stated :

" But generally matters of account, excepting in very weighty causes, are not fit for the court, but to be prepared by reference, with this provision, nevertheless, that the causes come first to hearing, and upon the entrance into a hearing; they may receive some direction, and be turned over to be considered and prepared. Totil, 49. " [Emphasis added]

It is suggested to this Court that in our case the surcharge issue against certain beneficiaries is such a " weighty cause " and that it must be considered and heard by the Court and not the Auditor. It involves over twenty (20) years of actions and reactions and complex testimony as to valuation, losses, damages, and motives.

To date, as was demonstrated in the various papers asking that the Auditor's fees not be paid, and will be more fully demonstrated in a Motion to Dismiss the present Auditor, (to be filed with the Court contemporaneously with this Motion), the Auditor has failed to comprehend even the most simplistic of matters, (i.e. how the testimony of four expert witnesses can be offset by the opinion of an unqualified, prejudiced beneficiary (who admitted that he had not seen the entire road), thereby necessitating a full day trip to view the Centre County Road, causing a great waste of time, effort, and money ; and, accordingly, he is not expected to comprehend the complexities of the surcharge issue.

On page 452 of the Locke case, supra, the Court summarizes the duties of the Auditors to hear the accounts; i.e. they may hear the entire cause, summon witnesses and make a report to the court, but

that report is only " prima facie evidence", and "not conclusive" and binding as to the award.

The Court in the Locke case, supra, allows the Auditor to hear all matters regarding the account. The Court affords the Auditors this power for an applicable statute awards them this power to hear every matter with regard to the account without restrictions bearing on the account. As the Trustee will show herein, no such broad statutory power can be found in the statutes, cases, or mandate to the Auditor in the case at issue.

Moreover, as noted above, even in the Locke case, supra, the report is only " prima facie evidence", not binding on the Court.

It is suggested that even in the Locke case, supra, where broad statutory powers were given to the Auditor, the Court nevertheless reserved to itself the power to determine difficult and complex questions of law. for this was and is reserved to the Chancellor, i.e. the Court. Thereby it becomes more costly and time consuming by using an Auditor, as in our case, and not the Court. It further appears to be the least direct and expedient method; especially when the issues (such as our) are this broad (involving legal as well as factual issues and the hearings so massive), that they should be decided directly by the Court

The Concept of an Auditor finds its way into a reported Pennsylvania case in the turn of the Century Pennsylvania case of Commonwealth v. Archibald , 195 PA. 317, 46 A. 5 (1900), in which the Pennsylvania Supreme Court holds that it may refer a matter, where the parties do not agree, to an accountant or other expert as an assessor.

While the Court , in the case at issue, in its Memorandum of May 26, 1995, (a copy of which, as previously noted, has been attached) correctly cites to the fact that the office of the " Auditor " has a history in Pennsylvania jurisprudence, that history, as the

Archibald case, id. p. 375, demonstrates, that its use and function are limited.

The Court in the Archibald case, id. p. 375, states that Pennsylvania legislature, due to certain abuses in referring cases to masters and thereby causing undue delay in their prosecution, by amendment to the Pennsylvania equity rules adopted in 1894 (see 159 Pa. St. XIV. 28 ATL. V.) provided:

" The office of master in chancery is hereby discontinued, except in proceedings where decrees or interlocutory orders are to be executed, or their execution supervised by an officer of the Court"

The Court on the bottom of page 5 states , in referring to a then leading equity treatise and a U. S. Supreme Court case (Beach Mod. Eq. Prac. par. 673, city Kimberly V. Arms , 129 U.S. 519, 9 Sp. Ct. 355, 32 L. Ed. 764") states :

" It is not competent for a court of chancery on its own motion, or upon the request of one party to abdicate its duty to determine by its own judgement the controversy presented, and devolve the duty upon any of its officers " [Emphasis added].

The Pennsylvania Supreme Court in the Archibald case, id at 376, next points out that whether the person to whom the case is sent be called an assessor, an auditor, a referee, or a master is of no importance. [Emphasis added]

The Archibald court has established that the terms " assessors, auditor, referee, or master" have essentially the same meaning under Pennsylvania law', and, therefore, the cases applicable to one are applicable to all, unless, of course, a distinction is made in a particular case.

The Archibald court, goes on to state at the bottom of page 376, in pertinent part:

" The substance of the matter is the right of the court in exceptional cases to avail itself of exceptional assistance in executing or supervising the execution of the details of its work not requiring the excise of exclusively judicial functions. " [Emphasis added]

Accordingly, the Pennsylvania Supreme Court has held that the function of an Auditor is to assist the Court in details of its work and not usurp judicial functions.

This holding has been affirmed by the Pennsylvania Supreme Court, in the more modern case of Darlington et. al. v. Reilly et. al. , 375 Pa 578, 101 A. 2 d 900 (1954), in which the Court held that it was proper for the trial court to appoint a referee or assessor in a case involving the auditing of a trustee- receiver's account to examine the claims of creditors and report to the court for its consideration and decision, Id. at 901.

The Auditor was to " examine " and "report" , not rule on questions of law.

The court, in citing to them Pennsylvania Equity Civil Procedural Rule 1514, 12 P.S. Appendix (formerly Rule 15) states on page 901 of the Darlington case, supra, in pertinent part:

" In application Rule 15 has been construed to mean that a court of equity lacks power to appoint a master or auditor to hear and pass upon facts or questions of law essential to an adjudication which it is for the Chancellor to make" [Emphasis added]

Modern Pennsylvania Jurisprudence does not allow the Court sitting as an equity court to appoint an auditor to hear facts and particularly law essential to the adjudication of the case.

The Court in explaining Rule 15 sets forth an interesting observation, on page 901, when citing to prior Pennsylvania cases, it states:

" This regulation was made so that the testimony, upon which the decree was based, should in all cases be heard by an equity court, and to remedy the abuse of shifting this burden from the chancellor to some chosen member of the bar, followed , as it would be by oppressive costs. " [Emphasis added]

A later Pennsylvania Supreme Court case has followed the decision in the Darlington case[3].

As has been pointed out to this Court starting on the bottom of page 1 of the Answer to Motion for Payment of Auditor's Fees, filed with the Court on April 11, 1995, (a copy of which has been noted above is attached hereto as Exhibit "A") the Auditor in the case at bar has constantly delayed hearings, thereby causing excessive and, therefore, oppressive costs to the Trust. Accordingly , the Court should hear this complex matter and thereby stop the long delay and costs associated with the Auditor, and oversee this matter directly..

A referee or auditor exercises only those powers delegated to him by the terms of the order of reference. Such powers as he may have are delegated and like those of all subordinate tribunals are limited by the terms of the order and statute coffering jurisdiction, since the referee takes no power by the implication[4].

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3 In Arcadia Theatre Company v. Sablosky, 418 Pa. 34, 209 A 2 d 375 (1965), the Pennsylvania Supreme Court, in a case involving the appointment of a Master to supervise the operation of a corporation during a stockholder's dispute, citing to the Darlington Case, supra, on p 379 of the Arcadia case, holds that the Court lacks the discretion to appoint a Master to pass upon determinative facts and questions of law.

4 See 76 C. J. S. ss 75, p. 222, a copy of which is attached

Accordingly, let us examine the statutory provisions under which he was presumably appointed and the scope of his commission under the order from the Court.

Regarding the appointment of Auditors, Rule 1514 of Pennsylvania Equity Rules of Civil procedure provides little guidance as to the functions of an Auditor. It merely states:

" Except as otherwise provided by Act of Assembly or rule of the Supreme Court, no examiner, master or auditor shall be appointed." [Emphasis added]

Rule 1515 of the Pennsylvania Equity Rules of Civil Procedure does provide for the employment of an accountant or other expert to " aid in the disposition of the action " [Emphasis added] in matters involving a complicated account. Presumably, this could be the Auditor in the case at issue. It should be noted that the statute says " aid in the disposition " not " decide" or "rule on the issues of law".

Rule 8 of the Pennsylvania Supreme Court Orphans Court Rules, annotated, applies to Auditors and Masters. section 8.3 of Rule 8 states, in pertinent part that:

" An Auditor's Report shall include a statement of the questions involved, findings of fact, conclusions of law - " [Emphasis added]

However, the statute does not further define the term " conclusions of law", and there are no annotated cases or other explanations under the annotated statutes.

In light of the history of the history of those powers

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hereto as Exhibit "H" with the applicable provisions underlined.

traditionally delegated to an auditor both in general equity law and specifically in Pennsylvania law, as noted in the above cited cases, and the statement in Corpus Juris Secundum (denoted in Exhibit "H" attached hereto and discussed above), that an Auditor's duties are not to rule as to the law and must be specifically denoted by statute and confirmed by the order of the Court, the above cited rule should be strictly construed by the Court and certainly not permit a ruling of law denying " full evidentiary hearings " involving substantial due process questions. This clearly should be reserved to the Chancellor, I. e. the Court.

In Rule 1009 of the Perry and Juniata County 41st Judicial District Rules of Court Governing Proceedings in the Orphans Court Division concerns Auditors and Master, the only reference to " Conclusions of law" appears in subsections (b) and allows a party "to present suggested findings of fact and / or conclusions of law" within ten (10) days of the close of testimony for such suggestions to be considered." [Emphasis added]. This is a reference to actions by the parties or their counsel, not the Auditor . In our case, more than a year has elapsed since the completed testimony of various issues, and still no recommendations, though requested on several occasions, has been forthcoming.

Subsection (C) of Rule 1009 has provisions that apply to the holding of hearings and allows a party to introduce witnesses and testimony (even if the Auditor sustains an objection to the introduction of such evidence) " --- unless the witness is clearly incompetent or the evidence is clearly inadmissible or the question or answer is impertinent, frivolous or scandalous". [Emphasis Added]

There appears to be nothing elsewhere in the Rules of the Supreme Court or Pennsylvania, case law (including available reported Perry and Juniata County case law) or acts of the legislature, that varies the provision of the above subsections.

Under the local rules of court of Perry and Juniata County,

the Auditor has to literally hear all witnesses and testimony. He does not have the right to exclude anyone or anything unless they fit within the above categories, which the Trustee's proposed evidence and witnesses do not. The fact is that these witnesses are extremely crucial to a just and favorable ruling regarding the surcharge claim. It is the Trustee's contention that the Auditor, being aware of this fact is acting on bias to exclude these much needed testimonies from the record, thereby jeopardizing the Trustee's and non-participating beneficiaries position in this matter. The Trustee does not intend to call witnesses who are " incompetent " or introduce evidence that is clearly " inadvisable" or ask questions or elicit answers that are " impertinent " , "frivolous" or" scandalous ". The local rules do not permit the Auditor to exclude it or them before he even knows what the evidence is or who will testify. The Offer of Proof above should demonstrate to the Court that neither the evidence nor the witnesses fit within the prohibited categories.

The Trustee's counsels research could not find any cases that discussed or varied the above provisions of subsection(c).

Hence, the trustee contends that the Auditor, under Pennsylvania Statutory Law does not have the right to deny full evidentiary hearings for any reason in the case at issue.

Regarding the four mandates of the Court given to the Auditor, (copies of which are attached hereto as Exhibit "I") , there are no specific directions contained as to the objections to 1986 and the 1992 accountings, the former Trustees Motion for Payment of Fees and the Motion to Surcharge Beneficiaries [5].

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5 The order of January 13, 1987, October 6, 1992 and September, 1993 only provide that the Auditor shall " take jurisdiction and proceed accordingly ." It should be noted that the order of August 25, 1993, regarding the surcharge, was handwritten over by the Judge in the last paragraph on

Once again, in the absence of specific directions to the contrary from the Court, the Auditor had no right under Pennsylvania case or statutory law, as noted above, to decide questions of law; particularly the lack of evidentiary hearings.

II. The Actions of the Auditor in denying Full Evidentiary Hearings Denies the Trustee substantive and Procedural Due Process.

As noted above in the stated facts, one hearing on a matter spanning over twenty (20) years was held by the Auditor on the surcharge issue on January 25, 1995, lasting approximately two and one- half hours. A good part of the time was spent discussing procedural matters; i.e. the request for rulings on the closed issues of the Trustees' request for fees and the surcharged beneficiaries exceptions on the 1986 and 1992 audits, and the for the Court to prepare a court docket encompassing the fifteen (15) year history of this matter, being that none was available. The Auditor denied them all, thereby usurping the courts authority, for the Court had not ruled on these issues which were contained in the January 18, 1995 Motion.

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page two of an Order which asked for a hearing before the Court. It stated " Parties express positions to Auditors at hearing before him". Once again, not very explicit; apparently, the Judge changed his mind after orally telling their Counsel Ralph Germak that he would hear the matter himself. The last of these, the Order and Memorandum of the Court of August 9, 1994, which reopened the hearings on the surcharge (which was filed as the Motion to Surcharge Beneficiaries on December 16, 1993, also attached hereto), after the stay in January, 1993, said that the Auditor should " conduct any additional proceedings that the Auditor may deem appropriate". if it meant that he makes a legal determination not to hold hearings, then it has delegated to him a duty reserved to the Chancellor (i.e. the Court), which it could not do under Pennsylvania case law cited above.

In addition, as noted above, motions for a continuance of the hearing were pending until two days before the hearing. Thereby, all parties were poorly prepared since there was no opportunity to subpoena witnesses, many of whom were out of state. Under such circumstances, as will be shown herein below, the case law is clear that there is a "denial of due process".

The "denial of due process" under the United States Constitution refers to the actions of the government (federal and state) taking away rights (in our case property rights) without an adequate and full hearing, with the right to present and confront witnesses. Implicit in the hearing is the right to have the Judge (or other hearing of evidence , i.e. the Auditor) observe the demeanor of the witnesses in the context of the rights being adjudicated.

For the Auditor to state that he has had the opportunity to observe the demeanor of witnesses begs the question. While only a few of the witnesses (three to be exact) may have appeared briefly before the Auditor in the context of actions on the objections to the accountings, they have never appeared before the Auditor in the context of an action against the surcharged beneficiaries for waste of trust assets. The stakes are entirely different; in the former case the Auditor is considering the validity of the expenses of the Trustee, while in the later he will be asked to consider the deliberate, offensive, and oftentimes completely unwarranted actions of individuals who caused harm to the Trust corpus, the present and former Trustee(s), and the non participating beneficiaries.

Most of the beneficiaries have never testified. Those that have , have done so in extremely limited circumstances, to answer specific inquiries unrelated to the potential surcharge against them. They have never been asked to testify where their motives will be questioned and their entire beneficial interest in the Trust may be at stake; obviously, the Auditor or the Court should observe their demeanor under these circumstances.

The Auditor has never had the opportunity to hear the testimony, question, and observe the demeanor of the expert witnesses on wasting of Trust assets; i.e. the one or more foresters that will testify as to the gypsy moth damage; and the financial experts on investments and losses of potential profitable investments of the Trust. Depositions and other means of discovery while helpful, are not a suitable form of presenting evidence when due process rights are involved. There are highly complex and interrelated areas of testimony; particularly as to the investments, the gypsy moth damage, the motives, etc. Charts and other graphic presentations will be essential to the understanding of this complex matter. In addition, the parties or their counsels and the Auditor or the Court, may wish to ask questions in an open hearing to understand what is going on. The Auditor will not be present at depositions. He will have to understand the matters from cold, dry testimony, without the opportunity to question the experts on issues that he may find well beyond the scope of his knowledge.

The Auditor is a quasi-judicial officer of the Court, i.e. the State, and through his office the past and current Trustee contend that their "due process rights" have been and are being violated.

The United States Supreme Court in the leading case of Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 LE 287, (1970) held that " procedural due process " had been denied unless a predetermination hearing in which the petitioner could present evidence, orally testify, or confront or cross examine witnesses was held before her rights to a federally assisted program to aid families with dependent children were terminated. The federal home relief program was administered by the State of New York and local governments.

In the Goldberg case, supra, under procedures adopted by the New York City Department of Social Services when the caseworker recommended termination, the recipient could have requested a hearing with a higher official and submitted a written statement to the

official for review, but may not have had an opportunity to appear before the reviewing official, for oral presentation of evidence, and for confrontation and cross examination of adverse witnesses. If the reviewing official determined ineligibility, aid was stopped immediately; at that point, the recipient may have requested a termination " fair hearing " before an independent state hearing officer at which the recipient may have appeared personally, offered evidence, confronted and cross examined witnesses against her or him, and have a record made of the hearing.

Likewise, in the case at issue, the Trustee has been denied by the Auditor the opportunity for a full evidentiary hearing prior to the Auditor's determination of the surcharge issue. She can not appear personally, present witnesses, and confront and cross examine witness against her. The right of depositions that the Auditor has afforded her, is very much akin to the written statements that were filed in the Goldberg case, supra.

The so-called later fair hearing may never occur in the case at issue, for if the Court does not reject the Auditor's report in its entirety (highly unlikely) and order full evidentiary hearings, there will be none. The appellate courts will only review the lower court records to find error and, if no hearings appear in the record, there will be very little to review. To raise the constitutional issue at an appellate level will require a long and cost consuming process, clearly not warranted in this case. If the appellate court remands, which the Trustee feels that it will, this will waste considerably more time and cause additional expense to a Trust that should have ended years ago, if it had not been for the actions of the Auditor.

In the case at issue, like the Goldberg case, the case involves state action that adjudicates important rights; i.e. property rights that are constitutionally protected under the 14th Amendment to the United States Constitution, U.S. C. A., Amend 14.

The U.S. Supreme Court on page 263 of the Goldberg case,

supra quoting from another U. S. Supreme Court case[6] states in pertinent part:

" Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental actions " [Emphasis added]

In a sense the case at issue is an easier case for a Court to balance the scale in favor of the private interests to be protected than the Goldberg case, supra, in that while in Goldberg the State was arguing that constant predetermination hearings would cost the State enormous sums of money, in the case at issue we have a unique case (not likely to be repeated in other cases) ; and the Trust is paying for the costs of the Auditor and the proceedings, not the State.

While it is true that the right of basic human substance denied in the Goldberg case, supra, is more compelling than the monetary loss in the case at issue, the costs to the State in the case at issue is literally nothing. In addition, " full evidentiary hearings" will most likely settle this matter indefinitely, and thereby avoid long and costly appeals for everyone, including the State.

The U. S. Supreme Court goes on to hold on page 266 of the Goldberg case, supra, that the fundamental requisite of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. [Emphasis added]

On page 270, the Court states that in almost every setting where important decisions turn on questions of fact, due process

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6 See Cafeteria and Restaurant Worker's Union, et. al v. Mc Elroy, 367 U. S. 886, 895, 81 S. Ct. 1743, 1748-1749, 6 L. Ed. 2d 1230 (1961).

requires an opportunity to confront and cross-examine adverse witnesses. In so doing the court ably holds:

" Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously. We have formalized these projections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment***. This Court has been zealous to protect these rights from erosion. It has spoken but not only in criminal cases, ** but also in all types of cases where administrative *** actions were under scrutiny." [Emphasis added]

While it is true in our case that a state administrative official is not taking away state monetary benefits from the Trustee, the State through the Auditor is seriously affecting private property rights (i.e. the rights of private individuals), and to "due process" and must and should protect these rights from State action.

In the case at issue, as the Trustee has noted in the facts above, that key elements will be "testimony of individuals whose memory might be faulty --- or persons motivated by malice, vindictiveness , prejudices or jealously. " [Emphasis added]

Hence, the right of confrontation is essential for due process to prevail.

The Goldberg case, deals with denial of " procedural due process " under the 6th and 14th Amendments to the U. S.

Constitution. The Trustee will demonstrate to the Court, that in addition, the Auditor's actions violate " substantive due process ".

The concurring opinion of Justice Stevens in Daniels v. Williams , 474 U. S. 327, 106 S. Ct. 677, 88 L. Ed. 2 d 662 (1986), provides an explanation of when lack of " procedural due process" and lack of " substantive due process" occur and how they can be differentiated.

Although the above cited case involved the rights of prisoners in a criminal setting (I. e. state prisons) the principals are equally applicable to civil cases.

Prisoner Daniels, alleging negligence, was injured when he slipped on a newspaper and pillows left on the stairway in a Virginia jail where he was incarcerated. Prisoner Davidson was injured by the attack of another inmate, and alleged and proved at trial that the state was negligent in not following a note warning a State prison official of the forthcoming attack by the inmate.

The Court on page 622 of the Daniels case, supra, first discusses the specific provisions defined in the Bill of Rights as constituting prohibitions against the state and federal governments under the first component of due process, where the plaintiff may invoke his constitutional rights of due process, irrespective of any State remedy available.

The Court then goes on to discuss the second and third components of due process (involved in the case at issue). Likewise, under the second component of " due process " a plaintiff may invoke his constitutional projections irrespective of the availability of a state remedy. The Court states, in pertinent part, id at 622:

" Second, it contains a substantive component, sometimes referred to as "substantive due process", which bars certain arbitrary

government actions " regardless of the fairness of the procedures used to implement them." [Emphasis added].

The second category encompasses the area of so called " substantive due process ", where, as in the basic projections afforded by the Bill of Rights, the plaintiff may invoke his constitutional projections under federal law, irrespective of the availability of a State remedy. In this category are those types of actions where the U. S. Constitution prohibits a State from " taking certain actions , regardless of the fairness of the procedures used to implement them".

In this regard the Court points to the leading cases of Paratt v. Taylor, 451 U. S. 527, 102 S. Ct. 1908, 68 L. Ed. 420 (1981), the so called " prisoner's lost mail case", and the very controversial abortion rights case of Roe V. Wade, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2 D 147 (1973).

Paratt V. Taylor , supra, involved a case in which an inmate of a state prison brought an action against the state for loosing his mail order hobby material when the normal procedure for receipt of mail packages was not followed by the State.

In order to prevail the inmate had to show that two essential elements were present: (1) the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived him of the rights, privileges, and immunities secured by the Constitution or laws of the United States 42 U. S. C. A., Art. 14 ss 1983.

In the Paratt case, supra, the Court held that while the respondent had been deprived of property under color of state law, he had not sufficiently alleged a violation of the Due Process Clause of the 14th Amendment. The Court states that the deprivation did not occur as the result of some established State procedure, but by the failure of State agents to follow established State procedure.

Moreover, the Court places great emphasis on the fact that full recovery could have been had under an alternative remedy, the State's Tort claims procedure, and, hence, this was sufficient to satisfy due process.

Once again, the U. S. Supreme Court in the Paratt case, on page 541 alludes to the balancing of the cost factor compared to the benefit to the individual , when it states, in pertinent part:

" At some point the benefit of an additional safeguard to the individual affected--- and to society in terms of increased assurance that the action is just must be outweighed by the cost." [Emphasis added]

In the case at issue as in Paratt V. Taylor , supra, there is a potential deprivation of property under color of State law; i.e. the Auditor by failing to allow the hearings may take away the Trustee's and the non participating beneficiaries' property. This action on his part (as has been demonstrated in the papers previously filed with this Court objecting to his payment) will be fully be demonstrated in the Motion for his dismissal) is but the end of a long history spanning eight (8) years in which his actions are part of a concentrated process to deny property rights to the Trust and the non- participating beneficiaries. In Paratt V. Taylor , the failure to follow a procedure was isolated, while in the case at issue it has been constant, and although consistently pointed out to the Court, the Court has failed to do anything about it, The clerk of the Court has not even kept a proper Court docket spanning fifteen (15) years in this case, and when this has been called to the attention of the Auditor on numerous occasions, the Court and the Auditor have refused to do anything to remedy the situation.

If any case involved a concerted action on the part of the State, i.e. principally the Auditor and, to a lesser extent, the Court, to deprive a litigant of her constitutional rights of due process, it has been this case.

As has been pointed out above, what few state statutes govern the proceedings before an Auditor do not provide any safeguards to assure that the Auditor will grant due process to all parties. Accordingly , it is submitted that the State through its inaction is fostering a violation of the Trustee's substantive due process rights.

In our case, unlike the Paratt V. Taylor case, supra, there is no alternate remedy. If the Auditor denies full evidentiary hearings, there is no statute under which the Trustee can sue the State or anyone else to recover her losses. It is doubted that the Trustee could recover under an action in Tort against the Auditor or the Court, which would might be blocked by sovereign immunity.

In the Roe V. Wade, case, supra, the U. S. Supreme Court held that the Texas State criminal abortion laws like Texas statutes making it a crime to procure or attempt an abortion except an abortion on medical advice for purpose of saving life of the mothers, regardless of the stage of pregnancy, violates the due process clause of the 14th Amendment protecting the rights to privacy against state action as embodied in the 14th Amendment to the u. S. Constitution.

The Roe V. Wade case talks in terms of deprivation of a woman's " right of privacy", a right which has been read into the fourteenth Amendment by the federal Courts over a period of many years. As such it is akin to a " property right", and a woman can not be deprived of it without due process of law.

Here the Court feels that the State statute, by denying the right to abortion at any stage of pregnancy clearly states a method of state act that denies the fundamental constitutional right of " privacy ", i.e. " a property right ".

Although in our case, the Auditor's refusal to hold a full evidentiary hearing (being the end of a long history of biased decisions) obviously has very little , if anything , in common with a

woman's right to have an abortion, the principal of denied of " substantive due process " is the same; i.e. concerted state action by the Auditor and, to an extent the Court, is denying the Trustee of her rights of " substantive due process ". When the Court summarily dismisses a Petition concerning an Answer to a motion filed within the statutory period and that Answer and Petition raise " lack of due process ", one can only state that this evidences that the Court's not affording the Trustee her rights of "due process".

When the State in its laws fails to provide adequate safeguards to protect the rights of litigants, it is part and parcel of the process of depriving them of the rights of "substantive due process". The Court on page 341 of the Daniels case, supra, holds that in order to prevail the petitioners must show that the proceedings contain a defect so serious that it can characterize the procedures as fundamentally unfair, a defect so basic that it is forced to conclude that the deprivation occurred without due process.

The Court in Daniels will not allow negligence by the state to be consistent with denial of due process; especially where there are adequate tort remedies against the state . In our case, the Auditor is acting deliberately and, as pointed out above, there are no adequate remedies against the state.

The third component referred to above, in the Daniels case, id at 622, is the component of " procedural due process" , that the Court enforced in the Goldberg case, supra. The deprivation of the property may be entirely legitimate, i.e. discharging a teacher[7],

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7 In the case of the Board of Regents of State Colleges V. David F. Roth et. al. , 408 U. S. 564, 92 S. Ct. 270, 33 L. Ed. 548, (1972) the Court held that the rights of "procedural due process" are not infinite and only applies to the rights that a person has already acquired in specific benefits. The Court held that since the teacher could find

punishing a student[8], or taking away welfare benefits (as noted above in the Goldberg case), but the state may fail to provide procedural safeguards; so that the taking away of the property is itself without due process of law. The state may have a right to take away the property , but not in the manner it does so.

The Court in Daniels, id. at. 622, provides, in pertinent part: Third it is a guarantee of fair procedure, sometimes referred to as " procedural due process" the state may not execute imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards.[Emphasis added]

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another job, the college had not violated his due process rights by failing to grant him a hearing on rehiring. His contract was for one year only, and , therefore the Court found no requirement that he be hired for a continuing period or that he be given a hearing after notification (right to " procedural due process"). This case also contains the element of "substantive due process" when the Court talks in terms of lack of "substantive due process rights" in the teacher's job, in that the contract of employment made it clear that it was only for one year.

8 Likewise in the case of Regents of the University of Michigan V. Ewing, 474 U. S. 214, 106 S. Ct. 507, 88 L. Ed. 523, (1985), the Court held that a student that was dismissed from a six (6) year combined undergraduate and medical school program of the University of Michigan, after failing the first part of the National Medical Board Examination and not allowed to retake it, did not have a due process right to retake it. The school had followed proper procedures in disciplining him, in that he had a long history continual substandard class performance.

The U. S. Supreme Court has consistently held that where parties are denied access to effective court process " procedural due process" is violated. Accordingly, in Boddie V. Connecticut, 401 U. S. 373, 91 S. Ct. 780, 28 L. ED. 2d. 113, (1971), the Court held that welfare recipients by being unable to pay court fees and costs for service of process in divorce cases were denied effective access to the Courts.

Likewise, in Mullane V. Central Hanover Bank and Trust Co., et. al., 339 U. S. 306, 70 Sp Ct. 652, 94 L. Ed 865 (1950), the Court held that, in settlement of the accounts of the Trustee, insufficient notice was given to trust beneficiaries (whose addresses were known) by publication in a newspaper. Ineffective notification had denied them effective access to the Courts.

Likewise, in our case, the Auditor by not affording us "full evidentiary hearings" is denying the Trustee effective access to the Courts. The inability to present witness, have the Auditor observe their demeanor, and confront and cross examine other witnesses renders the Trustee no effective hearing rights. Access is denied just as much as the inability to pay for service of process prohibits access and the inability to have notice does so.

The U. S. Supreme Court cases referred to above involve actions brought under the Civil Rights Act of 1871, also often demoted as the Ku Klux Klan Act, which among other remedies provides damages for violations of constitutional rights.

The section under which the actions are brought is 42 U. S. C. ss 1983, which provides:

" Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilege, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
[Emphasis added]

The actions for damages, in the above cited cases are brought against the official in an individual capacity, even if the individual acted in an official capacity in taking the alleged wrongful acts[9].

It is beyond the scope of this memorandum to discuss in detail the aspects of absolute and qualified immunities of state officials under 42 U.S. C. ss 1983. Suffice it to point out to the Court that the so-called " good faith " or " qualified" immunity that had protected Judges and other governmental officials or quasi governmental officials. (i.e. the Auditor) who regularly must exercise discretion in the performance of their duties, is now tested by an objective standard.

In Harlow V. Fitzgerald, 457 U. S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), the U.S. Supreme Court removed the " good faith " element from the defense and made it entirely objective, when it stated (457 U.S. at 818) that:

" Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" [Emphasis added]

The tort concept that " a reasonable person would have known " is now entering the concept of damages or lack thereof under qualified immunity.

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9 Hafer V. Melo, 502 U. S. 21, 112 S. Ct. 358, 116 L. Ed. 301 (1991).

In the case at issue, query whether the continuous and offensives intentional violation of " due process " by the Auditor over a period of eight years, might not be the basis for personal liability on his part.

In addition, if " due process " is not afforded by the Court now in decreeing full evidentiary hearings, and such rights can not be effectually raised in the future, whether the Court may be contributing to such denial.

Although judges and other judicial officials have in the past been held to be protected by absolute immunity in section 1983 civil rights cases[10], where they have acted outside of their jurisdiction they can be held liable for civil damages[11]. This is especially true when the judicial official utilizes his own office to vindicate personal objectives, as in the case of Harper V. Merckle, 638 F. 2d 848 (5th Cir. 1981), cert. denied, 454 U. S. 816 (1981), where the Court stated that since Judge Merckle, in a case involving alleged arrears in child support payments, clearly " acted out of personal motivation and [has] used his judicial office as an offensive weapon to vindicate personal objectives, and... no party ... invoked the judicial machinery for any purpose at all... " his acts fell outside the protection from civil liability under ss 1983.

Query whether a court might find that in light of the Auditors continual prejudicial actions and clear bias in favor of attorney Snelbaker and his clients, he was acting outside of whatever limited

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10 Pierson V. Ray, 386 U. S. 465, 87 S. Ct. 1213, 18 L. Ed. 2d. 288 (1967).

11 Stump V. Sparkman, 435 U. S. 347, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978), reh. denied 436 U. S. 951 98 S. Ct. 2862, 56 L. Ed. 2d 795.

judicial function he had (especially since, as demonstrated above, he had no right to decide upon legal issues " due process ") and therefore, he should be held liable for damages.

Fully evidentiary hearings (as due process requires) at this point might avoid such potential issues from being raised in the future.

Unfortunately, Pennsylvania reported case law does not widely discuss " due process" as to evidentiary hearings; particularly, in trust matters. However, two decided Pennsylvania cases, in other areas are appropriate. In the case of Dusquesne Light Co. V. Pennsylvania Pub. Util., 96 PA. Cmwlth. 168, 507 A 2d 433, (1986), the Commonwealth Court of Pennsylvania held that a notice to an electric utility company failing to disclose the precise role and conduct of the utility company in the shutdown of the nuclear plant, which the Public Utility Commission considered relevant to refund of net energy clause charges, did not afford the utility a reasonable opportunity to be apprised of the contentions, and, therefore, violated "due process", for the utility company could not answer unknown contentions.

In the Dusquesne Case, supra, the utility company contended and the Court agreed that the Commission failed to give it adequate notice that liability would be determined by examining the reasonableness of its actions immediately proceeding the shutdown. The order commencing the investigation had merely stated that it was to determine what adjustments if any were to be made to the utility company's base rates due to the shutdown. In addition, the hearing itself concentrated on the designs of the facility, not the actions of the utility immediately prior to the shutdown.

Although the Dusquesne case, supra, does not deal with the need for a full evidentiary hearing to satisfy "due process" in a trust context, it does stand for the proposition that not only must a hearing be afforded to satisfy " due process" before rights to property are

determined, but a party must be apprised of its opponent's intentions so that it may respond to them. The opportunity to present witnesses and to confront and question witnesses must be present at that hearing.

Likewise, in the case of Pocono Water Company V. Public Utl. Com'n., 158 PA. Cmwlth. 41, 630 A. 2d 971 (1993) the Commonwealth Court of Pennsylvania, followed the Duquesne case, supra, in holding that the complainant must be given a reasonable opportunity to address issues in an evidentiary hearing. In this case, the Commission had issued an order based on a prior order, without affording the complainant an opportunity to be heard in a "full evidentiary hearing".

In order to find " lack of due process " applied in a trust situation, the Trustee cites to a court case in a sister state, California. In the case of In Re Buchman's Estate, 123 CA. 2 d 546, 267 P. 2d 73 (Dist. Ct. of Appeal, 2nd Dist; Div. 3. 1954), [a copy of which is attached hereto as Exhibit "J"] in which the California appellate court held that, in a case in which the executor of an estate was removed due to mental disease causing him to be incompetent to act, his " due process " rights had been denied by failing to give him a just, fair, and impartial hearing.

In the Buchman's Estate case, the executor appeared in Court on an order to show cause why he should not be removed as the executor for failure to file an inventory of the estate within the three month period after his appointment prescribed by law. At the initial hearing, evidence was presented as to the executor's mental condition, and in chambers the Judge attempted to have the executor resign. He refused and later refused in open court after his counsel has resigned. The Court had stated that he should consult a psychiatrist.

At a continuation of the hearing, where he was represented by new counsel, the Court refused to admit an "offer in proof" in which the executor offered to show the Court that he had gone to the doctor,

but would not have the interview without a witness, his attorney, present and that the psychiatrist had called the Judge, and that after the conversation, the psychiatrist refused to continue the interview.

After denying the offer of proof, the trial court removed the executor. In overruling the trial court the California appellate court states on p. 84, in pertinent part:

" The fundamental conception of a court of justice is condemnation only after notice and hearing. No one may be deprived of anything which is his to enjoy until he shall have been divested thereof by and according to law. Under the constitutional guaranties no right of an individual, valuable to him pecuniarily or otherwise, can be justly taken away without its being done conformably to be principles of justice which afford due process of law, unless the law constitutionally otherwise provides. Due process of law does not mean according to the whim, caprice, or will of a judge, Matter of Lambert, 134 Cal 626, 632-633, 66 P. 851, 55 L. R. A. 856 [86 Am. St. Rep. 296]; it means according to law. It excluded all arbitrary dealings with persons or property. It shuts out all interference not according to established principles of justice, one of them being the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with evidence. Massachusetts Ins. Co. V. Industrial Acc. Comm., 74 Cal. App.d 911, 170 P. 2d 36 " [Emphasis added]

The Court then goes on to provide, in pertinent part:
" The power vested in a judge is to hear and determine, not to determine without hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where

the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgement accordingly. " [Emphasis added]

The above quoted California case is important in that it shows the right to " procedural due process " sustained in a case not involving crimes, prisoners or the government (State or Federal) denying governmental benefits to the petitioner. Here, as in the case at issue, the government is taking away private property rights in purely private property, and the higher Court is saying that it can not do so without affording " procedural due process ".

It is the last quoted paragraph of the Buchman's Estate case, cited above that best describes that " due process " the Trustee is seeking. She desires an open hearing in which both sides may present evidence of both sides of the evidence, and from that consideration, a conclusion as to where the truth lies. From these considerations a fair judgement can be rendered . Constitutional due process requires it, and the Court should uphold the Trustee's right to it.

The previously cited holding of the case of In Re Buchman's Estate, supra, is cited by the Montana Supreme Court in the case of In Re French's Estate, 137 Mt. 347, 351 P. 2d 548, 594-595, (1960) [a copy of which is attached hereto as Exhibit "K"].

The French's Estate case, supra, involved the question of admission of a holographic will to probate. However, one of the issues discussed in the dicta of the French's Estate case, supra, involved the dismissal of an Executor by the Court without a hearing. While in the In Re Buchman's Estate, supra, case there was an inadequate hearing, in French's Estate, supra, there was no hearing. In the French's Estate, case, supra, the reason for the dismissal was the alleged drunkenness of the Executor, coupled with failure to file an inventory. Once again, there was an " offer of proof" made to the Court, which the Court rejected.

The main issue presented to the Montana Supreme Court in

the French's Estate case, supra, was whether the trial court erred in admitting a holographic will to probate. In addition, the trial Court had removed the executor under the holographic will without a hearing. Due to the fact that the Montana Supreme Court reversed and remanded, holding that the trial Court had erred in admitting the holographic will, id. at 551, there was no need to specifically rule on the issue of removal of the executor in its holdings.

However, the Supreme Court left open for the trial Court in its remand instructions the question of the validity of certain provisions of a typewritten will and its admission to probate. Accordingly, Justice Adar discusses the lack of " due process" in removing the executor in dicta, as noted below.

Justice Adar in the dicta in the French case, 351 P. 2d. id at 595, repeats the due process clauses of the In Re Buchman's Estate case, supra, quoted above . He then goes on to show that the executor was not put on notice as to the charges against him, and, accordingly, could not defend against them.

Justice Adar states, in pertinent part , on page 595.
" The constitutional right to notice and hearing cannot be taken away in the fashion that was attempted in the present case. The judge's conception of his duty was entirely erroneous. The plainest principles of justice required that the appellant be given notice of the specific charges against him. No notice was given him that he was to be removed on the ground that he was so mentally deranged as to be incompetent to act as executor . *** He had no authority or power, without notice or hearing, to remove him. Appellant was not only not accorded a just, fair, and impartial hearing; he was not accorded the right or opportunity of any hearing, either on the charge that the inventory was not filed in time or on the ground, not charged, that he was so mentally deranged as to be incompetent to act as executor. No legal evidence was produced that he was incompetent to act. He was denied the opportunity of presenting any evidence. His offer of proof was erroneously rejected. In short, he was denied due process of law."

[Emphasis added]

The last quoted sentence of the Justice Adar succinctly states the matter when the Court states that: " In short, he was denied due process "

SUMMATION

The Trustee in the above stated Offer of Proof has demonstrated to the Court what evidence and witnesses will be brought before the Court in " full evidentiary hearings". She has also demonstrated why these witnesses and evidence must be brought before the Court now for a proper adjudication of the Surcharge Issue.

She has further demonstrated that the Auditor clearly has acted in a biased and professionally irresponsible manner and abused his mandate from the Court and/or under law both from the viewpoint of the historical nature of his office and contemporary jurisprudence. The Auditor was never permitted to rule on the substantive issue of whether or not " full evidentiary hearings" should be held, and should not now be permitted to do so. To the extent that the Court now allows him to do so, it is abrogating a function to him traditionally reserved to the Chancellor; I. e. the Court. Past and modern practice does not allow the Court to abrogate its functions.

In addition, the Trustee has thus clearly demonstrated that unless this Court overrules the Auditor and orders full evidentiary hearings on the surcharge issue her rights as to both "substantive and procedural due process" will be violated. Federal and State law supports this contention. To the extent that she may not be presently afforded " due process", she may never achieve " due process", for " justice delayed " may be " justice denied", for some witnesses and records have become unavailable, and the passage of time will amplify this process.

Due to the lack of a proper Court docket and rulings on the

closed issues (I. e. request for Trustee's fees and the surcharged beneficiaries exceptions to the 1986 and 1992 audits), the Trustee can not adequately present the surcharge issue to the Court, and, hence, has been denied "due process" by the Court. The Court should rule on these issues that are extremely critical to the surcharge claims before any further hearings or evidence is heard on the surcharge issue. Rulings on these issues have been requested on several occasions, but most recently in the Motion of January 18, 1995, to the Court, which to date has not been ruled upon.

In light of the clearly shown bias and professionally irresponsible conduct of the present Auditor, " due process" calls out for a hearing before an unbiased Judge. Due to the highly complex nature of the surcharge issue, it is respectfully requested that the Court hold such hearings, for, as noted above, complex cases were reserved for the Chancellor.

Although the Trustee has amply demonstrated that present federal and state case law dictates that "full evidentiary hearings " should be held in the case at issue, the issues presented are somewhat unique and far reaching in that they invoke the rights of private parties (the Trustees and the non participating beneficiaries) to have their private property rights (not government benefits or rights) adjudicated in a manner not to deny them " due process of law". A well reasoned California Appellate decision and dicta of the Montana Supreme Court uphold the Trustee's position.

Accordingly, it is respectfully requested that the Court utilize its good offices to hold a hearing on these issues before issuing any rulings. The U. S. Constitution and case law require a decision after full and adequate hearings, not without full and adequate hearings.

Respectfully submitted,

_____/s/_____

Leonard F. Binder

Dated: June 26, 1995

by: _____/s/_____

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APPENDIX F

IN THE SUPREME COURT OF PENNSYLVANIA

THE TRUST OF C. A. AND FLO B. WHITE, BY NANCY WHITE VENCIL AS TRUSTEE,	)	
Plaintiff,	)	
-vs-	)	CASE:
JUDGE KEITH B. QUIGLEY, AS PRESIDENT JUDGE, COURT OF COMMON PLEAS, 41ST JUDICIAL DISTRICT OF PENNSYLVANIA, JUNIATA AND PERRY COUNTIES, ORPHANS COURT DIVISION	)	
Defendants.	)	

COMPLAINT

1. This is an action for a writ of mandamus.

2. The Plaintiff, a Pennsylvania Trust through the present Trustee, Nancy White Vencil, residing in Mechanicsburg, Pennsylvania, brings an action against the Defendant and petitions this Court by and through the undersigned counsels pursuant to Pa. R. C. P. 1091 to issue a writ of mandamus requiring the Defendant in his capacity as a Judge of the Orphans Court to issue rulings on Petitions, Motions, and Appeals, as clarified herein, presently before his Court.

3. The Defendant is the president Judge of the Court of Common Pleas, 41 st Judicial District of Pennsylvania, Orphans Court Division, and is the presiding Judge in the case of In Re: Trust of C. A. and FLO B. White, No. 34-77-67, presently from 1980 to date, before the Orphans Court.

4. The Plaintiff seeks to invoke the jurisdiction of this Court through 42 Pa. C.S.A. ss 721 (2), which provides that the Supreme Court shall have original but not exclusive jurisdiction of all cases of mandamus to courts of inferior jurisdiction. Jurisdiction is properly in the Supreme Court in that there is no appeal or other actions pending in any lower appellate court. Com. ex. rel. Specter V. Dennis, 10 Pa. Cmmwlth. 439, 308 A. 2 d. 915 (1973); and Municipal Publications, Inc v. Court of Common Pleas of Philadelphia City, 507 Pa.194, 489 A. 2d 1286 (1985)

5. As enumerated below, the Defendant in his capacity as presiding Judge of the Orphan's Court has refused to issue rulings on motions and appeals, thereby depriving the plaintiff of her rights of both " substantive" and "procedural due process". There is no other adequate remedy at law; and, accordingly, this action for a writ of mandamus is her only means of protecting her rights, as Trustee of the C. A. and Flo B. White Trust.

6. On January 18, 1995, the present Trustee filed a motion with the Orphan's Court requesting rulings on the surcharged beneficiaries exceptions to the 1986 and 1992 accountings, and rulings on the former Trustee, Raymond E. White's request for fees (the "Closed Issues"), and a proper court docket, prior to setting a surcharge hearing (see Appendix). At the time of this filing, there were no determinations by the Defendant on matters before the Orphan's Court filed in January, 1987.

7. The issues enumerated in allegation # (6) above are a condition precedent to the surcharge hearing requested by motions filed on January 18, 1995, with the Orphan's Court in the above referred to case, as they lay the foundation for such hearings. To date the Defendant has not ruled on these issues.

8. On April 11, 1995, the present Trustee, by her counsels Leonard F. Binder and Robert S. Mirin, filed with the Orphan's Court an Appeal of an Order by the Auditor of March 22, 1990, denying an extension of time to respond to the Auditor's Memorandum of January 25, 1995 (dated January 30, 1995), ordering the Trustee to provide in forty- five (45) days the surchargeable costs, damages, etc. (see Appendix); even though the Defendant had not ruled on the request for rulings on the closed issues and a proper court docket (as enumerated in allegations #6 and #7 above), a condition precedent and necessary in order to compile the surchargeable amounts . The

Appeal requested a hearing before the Defendant before he issued his order. To date neither a hearing has been set by the Defendant nor has the Defendant ruled on the Appeal. The Auditor, Daniel Stern, had previously been appointed on January 13, 1987 by the Defendant to hear the exceptions by the surcharged (participating) beneficiaries to the 1986 accounting and was subsequently appointed by the Defendant to hear exceptions by the participating beneficiaries to the 1992 accounting and the Trustee's and non participating beneficiaries exceptions to surcharge the participating beneficiaries. To date, no rulings on the participating beneficiaries' exceptions have been made, even though the record has been closed on these issues for nearly a year and a half.

9. On March 22, 1995, the Auditor filed with the Court a Motion for Payment of Auditor's Fees (" the Motion"), for fees and expenses rendered during the period May 7, 1992 through March 17, 1995. On April 11, 1995, within twenty (20) days after the filing of the aforesaid motion, the Trustee filed an " Answer to Motion for Payment of Auditor's Fees (" the Answer"), see Appendix.

10. Pursuant to paragraph 9 of the Answer, referred to in allegation #9 above, the present Trustee (due to the fact that substantial property rights were effected), requested a hearing before the Court ruled on the Motion. The Trustee stated that to deny the Trustee a hearing would deprive the Trustee of both "procedural" and "substantive due process".

11. On March 27, 1995, five days after the Auditor had filed the motion referred to in allegation # 9 above, the Defendant signed the Auditor's Proposed Order approving the payment of his fees, without waiting the twenty days under Rule 3.2 (a) of the Pa. Orp. Ct. R. in which any effected party, i.e. the Trustee on behalf of the Trust, could file the Answer protesting the Motion for the Payment of the Auditor's fees.

12. Although the Proposed Order was signed on the 27th of March, 1995, and filed with the Clerk of the Court on the 30th of March, 1995, the Clerk of the Court did not mail copies of the Proposed Order to the Trustee and her counsels until the 5th of May, 1995 (see Appendix), more than thirty (30) days after the order was signed and filed. Copies were received by the Trustee and her counsels on the 8th of May, 1995. On May 16, 1995, the Trustee through her counsels filed a Petition for Withdrawal and rehearing of

Proposed Order of March 27, 1995, Approving Payment of Auditor's Fees (" the Petition"), see Appendix, pointing out that the Defendant had errored as a matter of law in issuing the Proposed Order, and once again asking for full evidentiary hearings before the Defendant issued his determination as to approval of the Auditor's fees.

13. On May 16, 1995, the Defendant signed an Order and Memorandum [which was mailed to the parties of May 18, 1995, and will hereinafter be referred to as the May 18th, Order and Memorandum) denying the Petition referred to in allegation #12 above (see)]. On the second page of the May 18th Memorandum, the Defendant dismissed the rights of the Trustee to approve the payment of the Auditor's fees by stating that the Auditor performs in a "quasi judicial capacity at the request of the Court", and that the court had never heard of any situation where the Auditors fees and expenses had been challenged , even though the Auditor's negligent behavior and biased actions had caused severe economic losses to the Trust's assets . The Defendant continued, that however, this was not to suggest that some authority may not exist. The Defendant then went on to state that to challenge the expenses of the Auditor would be similar to complaining about the overhead of the Court. The Defendant did not believe that it was necessary to give anyone an opportunity to address the issues of the Auditor's fees and expenses.

14. Under the May 18th Memorandum, (referred to in allegation # 13 above), the Defendant ordered the Trustee to make payment within ten (10) days, or risk contempt. She did so under protest by a letter to the Clerk of the Court dated May 25, 1995, with copies to the Defendant and the Auditor (a copy of which is attached as Exhibit " XV" of the Motion to Dismiss the Auditor for Cause, referred to in allegation # (16) below), subject to the condition that the fees not be paid out of the escrow account of the Court, until either released by the Trustee or after the last appeal to a higher court. It also noted that a second motion for a rehearing would be filed with the Court, and stated that a leading Pennsylvania Supreme Court Case and other cases would be cited and discussed to show that the Auditor's fees could be challenged within the period prescribed by law and appeal taken, if necessary. By Order of June 8, 1995 (without a hearing), accompanied by a letter of the same date (copies of which are attached as Exhibit " XV" of the Motion to Dismiss the Auditor for Cause, referred to in allegation #(16) below), irrespective of the above, and before the second motion for a rehearing was filed (prior to the end of the period prescribed by law for such filing), the

Defendant ordered the Clerk of the Court to pay the funds to the Auditor, clearly in violation of rule 1522 of the Pa. R. C. P. The Defendant's Court is the trial court, not an appeals court.

15. On June 16, 1995, the Trustee, through her counsel filed with the Court (June 19, 1995 is shown as the Court filing date by the Clerk's stamp) a Petition for Withdrawal and Second Rehearing of Proposed Order of March 27, 1995, and all subsequent Orders regarding Approval and Payment of Auditor's Fees, together with a Memorandum of Law (hereinafter referred to as the " Second Petition"), pointing out that the Auditor was not an official of the court similar to a salaried employee, and citing and discussing at length two Pennsylvania Supreme Court Cases and one Northcumberland County Case, noting that the " fair and reasonable " compensation of an Auditor can be questioned by the Court (see). Once again the Second Petition asked for a ruling by the Defendant and a hearing before any ruling. To date the Court has neither granted the hearing nor ruled on the Petition, thereby denying the Trustee access to any appeal of the payment of the Auditor's fees. Steccone v. Morse Products Co., 191, F. 2D 197, 199, (9th Cir. 1951). This, in effect, denied her "due process of law".

16. On June 26, 1995 (received by the Orphan's Court on June 29, 1995), the Trustee through her counsel filed a Motion For Full Evidentiary Hearings in the Surcharge Issues (coupled with a Memorandum of Law and a Notice to Plead) , a Motion to Dismiss the Auditor for Cause, containing one hundred and one (101) documented allegations of the Auditor's bias, misconduct, and denial of " due process " (coupled with a Memorandum of Law and Notice to Plead), and a Motion For Rulings on Motions Previously Pending Before the Court and Hearing on All Motions presently before the Court (see), listing all of the Motions , Appeals, and Petitions pending; as noted above, except for the Second Petition which was inadvertently omitted, but is still pending (no rulings having been issued nor hearings granted). The Defendant has not issued rulings nor set any hearings on all of these Motions, Appeals, and Petitions. The Plaintiff apologizes for the lengthy nature of the Motion to Dismiss the Auditor for Cause, containing one hundred and one (101) documented allegations, but in response to the Defendant's past and current action in denying hearings, and lack of an adequate Court docket, felt compelled to include all documentation to substantiate all allegations against the Auditor, being that most likely a hearing would be denied to her.

17. On June 30, 1995, the day after the Motions and other papers listed in allegation # 15 above had been filed, and before the twenty (20) days had elapsed under Rule 3.2 (a) of the Pa. Orp. Ct. R. in which the Auditor or any other interested party could respond, and irrespective of the specific Notices to Plead pursuant to Rules 1026 and 1361 of the Pa. R. C. P., the Defendant signed an Order, together with a Memorandum of Law and Letter to the Clerk of the Orphan's Court , Mrs. Nancy Leibkicher (see # 8A), stating that the Auditor would continue with the depositions, and that no hearings would be held, once again clearly violating Pennsylvania procedural law and denying the Trustee her rights of " due process ". No specific rulings were issued on any of the Motions, Petitions , and Appeals then before the Court, and these were deferred until after the report of a biased Auditor (whose removal based upon 101 documented allegations of negligence, inaptitude, bias, and misconduct had been sought) , was presented to the Court. The only justification was that the issues might become moot. This begs the question, for after substantial rights have been violated, it may be too late to do anything meaningful.

18. On the second page of his Memorandum of June 30, 1995, the Defendant states that while it is true that the Judge has made some rulings that some folks might consider " from the hip" or precipitous or perhaps even in violation of due process (emphasis added), the Court is doing this for expediency. Query why the Defendant now would become so time conscious after he has allowed eight (8) years of exceptions to remain unresolved. This flies in the face of numerous U.S. Supreme Court cases cited to the Defendant in the Memorandum accompanying the Motion For Full Evidentiary Hearings (see , P. 33 cit seq. of exhibit 8, citing cases including Goldberg v. Kelly, 397 US. 254, 90 S. Ct. 1011, 25 L. Ed. 287 (1970), that " procedural due process" once denied may not later be obtained).

19. If the Defendant had read the so-called "four pounds of motions" (or even the basic Motions and Memoranda without exhibits, which only encompassed about one-hundred pages), filed by counsel and received by the Court on June 29th, and withheld his order until doing so (not issuing his order on the next day), the importance of rulings would have been clearly evident to him. Instead he chose not to read papers, properly and timely presented to the Court by the Plaintiff through her counsel, and to state on the second page of his Memorandum that he was issuing another " shoot from

the hip" order in respect to Mr. Binder's four pound motion. Canon 3 A. (1) of the Pennsylvania Code of Judicial Conduct states, in pertinent part, that a judge should be faithful to the law and maintain professional competence in it. In addition, Cannon 3 (A) (4) requires that a judge accord to every person who is legally interested in a proceeding, or his attorney, full right to be heard according to the law. A so- called " shoot from the hip order " , not based upon the law and violative of both state court procedural rules and the Plaintiffs " due process rights", which denies the plaintiff's right to be heard, would not appear to fit within these criteria. Although this Court in Reilly v. Southeastern Pa. Transp.,507, Pa. 204, 489 A 2d 1291, 1298 (1985) , stated the Canons of Judicial Ethics do not have the effect of substantive law, but impose standards on the judiciary for self-assessment as to whether a judge should recuse himself from a matter pending before him, nevertheless, counsel felt that this should be pointed out to the Court, and that the Defendant might consider recusing himself from this case.

20. In the last paragraph of apparently the second page [the pages being unnumbered] of his Memorandum of June 30, 1995, (referred to in allegation #17 above), the Defendant states that very possibly the proceedings should be conducted by an assigned Senior Judge who would have more time to devote to the issues, but that this was up to the A. O. P. C. and can not be assured. Query why didn't the Defendant seek possible assignment of a new judge now from the A. O. P. C., in the interests of justice, rather than issuing his " shoot from the hip order" and waiting until justice may have been denied, for "justice delayed is justice denied". Commwealth v. Keenan, 347 Pa. 574, 33 A. 2d 244 (1943)?. In the Keenan case supra , this Court stated that the president judge of the Court of Common Pleas of Westmoreland County could not delay deciding on pending cases (some of which were pending for periods less than the Motions at issue here), due to some unspecified illness, which he alleged did not allow him the time nor the physical capability to handle the caseload.

21. In the fifth paragraph of the Defendant's Memorandum of June 30, 1995 (referred to in allegation # 17 above), he states that while some of the allegations in the Motion to Dismiss the Auditor For Cause are frivolous and without merit, some have merit, to which the Plaintiff takes issue for she painstakenly documented these issues to prove their merit . By refusing to rule on the various Motions , Appeals, and the Petitions before his Court, the Defendant (particularly as to those referring to non-payment or dismissal of the

Auditor) was clearly showing his bias in favor of the Auditor by, in effect, excusing the Auditor from addressing, in answers, the serious questions of his bias and misconduct as an officer of the Court, even though the notices to plead specifically required replies. Furthermore, even if the Defendant, though in error, feels that only some of the allegations contained in the Motion to Dismiss the Auditor for Cause are admitted to have merit, then why doesn't the Defendant at least consider them, and rule? Isn't that the function of the trier of the facts; i.e. the Court?

22. On the third page of his Memoranda of June 30, 1995, (referred to in allegation # 16 above), the Defendant notes that although the expectation of Appellate Court intervention has been suggested for the past month or so, no action has been taken. No action could be taken by way of appeal in that by refusing to rule, no appealable issue exists and mandamus is the only and appropriate remedy. Steccone v. Morse-Starrett Products Co., cited in allegation # 15 above; id 2d., 197 F. 2d. 197, at 199 citing to In re Grossmayer, 177 U.S. 48, 49-50, 20 S. Ct. 585, 44 L. Ed. 665 (1900).

23. The Defendant in the 5th paragraph of his letter of June 30, 1995 to the Clerk of the Orphans Court (referred to in allegation # 16 above), notes that he intends to hold all parties to the time limitations and procedures that he has set forth, barring something in the nature of a writ of prohibition from a superior court. The Orphans Court does not lack jurisdiction to hear these matters; but the Defendant refuses to issue rulings or determinations on them. Accordingly, a writ of prohibition is not the proper remedy in this case in that prohibition is an extraordinary remedy intended to prevent an inferior judicial tribunal from assuming jurisdiction it does not possess. Washington County Com'rs v. Pennsylvania Labor Relations Bd., 490, Pa. 526, 417 A. 2d 164,167 (1980). A writ of mandamus is the proper remedy in that under the Act of June 8, 1893, P. L. 345, 12 ps ss 1911 et seq. and present Pennsylvania case law it is specifically provided that a writ of mandamus may be utilized to procure the enforcement of a public duty or to compel a judge of inferior jurisdiction to perform his duties. Commonwealth ex rel Duff v. Keenan, supra, allegation # 20 above, Id. 33 A. 2d at 249 et. seq., cited with approval in United States v. Carson, 126 F. Supp. 137 (W.D. Penn. 1954). [Emphasis added].

24. In December, 1993, the prior trustee, Raymond E. White, filed a Motion to Surcharge the Participating Beneficiaries for the

substantial losses forced upon the Trust assets as a result of their fifteen (15) years of unwarranted litigation. This motion followed similar motions filed in October and November 1992, brought forth by three non-participating beneficiaries that were filed as part of their exceptions to the 1992 accounting. The Trustee's Motion to Surcharge of December, 1993 was modified by the present Trustee in February, 1995. The Defendant has given no formal or informal acceptance of this modification; nor has he notified the Trustee with regard to the need for amendment, although requested to do so [(see 8,) Memorandum to Motion for Full Evidentiary Hearings of June 30, 1995, pages 2, 7 et. seq.]

25. On January 24, 1995, opposing counsel Richard Snellbaker, filed an untimely answer to the original surcharge Motion of December 1993, citing latches and the statute of limitations to which the Trust's counsel promptly responded with a Reply and Memorandum of Law in February, 1995. Opposing counsel has never filed a Memorandum of Law opposing Trust Counsel's Memorandum of law and the Defendant has not seen fit to either require such a response nor has he responded to these issues, irrespective of the fact that the Trust counsels through memoranda, correspondence, and motions have repeatedly cited these court irregularities, but the Defendant has continually evaded responding to these issues. (see 8, Memorandum to Motion for Full Evidentiary Hearings of June 30, 1995, page 2 and 7). At a hearing before the Auditor on January 25, 1995, (see 8, copies of the applicable pages of which are attached as exhibit XVI of the Motion to Dismiss the Auditor for Cause, referred to in allegation # 16 above), the Trustee's counsel moved to strike Attorney Snellbaker's Answer for being over a year late (see 8, page 22, Exhibit XVI of the Motion to Dismiss the Auditor For Cause). This was not dealt with by either the Auditor or the Defendant. If allowed to stand, attorney Snelbaker's untimely answer to the Surcharge Motion could constitute grounds for dismissal of the Surcharge; yet the learned Defendant who in his Memorandum of June 30, 1995, as noted in allegation # 20 above , justified his course of action based upon expediency, did not see fit to decide upon an issue that could have possibly obviated the entire need for any hearings and/ or depositions on the surcharge issues. Even under the Defendants' unrealistic schedule, this could have possibly saved the Court at least three and one half months of valuable time. Trust counsel contemplated filing a motion for partial summary judgement to further call this to the Defendant's attention; i.e. the need to dispose of this issue, but knowing that he would have an

impossible battle having opposing Counsel Snelbaker agree to anything, particularly a stipulation of undisputed facts, and given the unwillingness of the Defendant to do anything about deciding any motions, deemed that this would be an additional unwarranted expense to the Trust.

26. At a hearing before the Auditor held in October, 1993, counsel Binder was required by the Auditor to file a Memorandum of Law concerning the allowance of Trustee fees, fees for the sale of lumber, possible renewal of a lumber cutting contract for Raymond E. White, the then Trustee, and the tax consequences to the beneficiaries of distributions in land vs. cash. He filed a lengthy Memorandum in December, 1993, and opposing counsel never filed a reply memorandum, nor has the Auditor or the Defendant ever commented on his failure to so reply nor required him to reply. Ms. Vencil upon her appointment as Trustee cited this fact to the Auditor in the correspondence of July, 1994, (at a time when due to lack of financial resources she could not hire Trust Counsel), to which no response was forthcoming by the Auditor, nor the Defendant.

27. This was noted on pages 19 et. seq. , in the allegations of the Motion to Dismiss the Auditor for Cause, referred to in allegation # 16 above. Allegation # (61) and #(62) of the Motion to Dismiss the Auditor for Cause stated:

"(61) Accordingly, it is the Auditor's position that *attorney Snelbaker's failure to brief the arguments raised by attorney Binder's Memoranda of law of December, 1993, and February, 1994,* (inadvertently stated as " 1994", when "1995" is the proper date) *shall be deemed to be waivers of all arguments raised therein.*

(62) In addition, if the Auditor fails to plead under the Notice to plead attached hereto, and brief the argument for his removal as counsel's for the Trustee have done in the attached Memorandum of Law), he shall be deemed to have waived all arguments raised herein and in the Memorandum of Law, accompanying this Motion." (Underlining added).

28. As was pointed out in allegation # (63) on page 20, of the Motion to Dismiss the Auditor for Cause, referred to in allegation # 16 above, Trust counsels through memoranda, correspondence and motions have repeatedly cited to these court irregularities and the

Auditor and the Court have continually to date of this complaint failed to issue rulings. The Order of the Defendant of June 30, 1995 by completely ignoring the Motion to Dismiss the Auditor for Cause before the Auditor was required to answer the Motion or risk the Motion being granted and the above referred to Allegations being admitted (as well as attorney Snellbaker's failure to answer the Memoranda of law of December, 1993 and February 1995 being admitted), excuses both the Auditor and opposing counsel from complying with Pennsylvania Court procedure. Through failing to rule the Defendant has prevented the Court from hearing the Auditor's and opposing counsel's views on the Plaintiff's serious allegations.

29. As was extensively pointed out beginning on page 20 of Memorandum accompanying the Motion for Full Evidentiary Hearings (referred to in allegation # 16 above) , the Auditor was appointed to aid the Court and the Court does not have the authority to delegate its full authority to him, but should have supervised him. Field and Others v. Holland and Others 10 U.S. 8, 3 L. Ed. 136 (1810), a copy of which is attached as Exhibit "F" to the Memorandum to Dismiss The Auditor For Cause, referred to in allegation #16 above. [Emphasis in text of this allegation added]. This was made clear by this Court in Commonwealth v. Archibald, 195 Pa. 317, 46 A. 5, 6 (1900), cited on page 5 of the Motion for full Evidentiary Hearings, referred to in allegation #16 above. Accordingly, the Defendant not only should have ruled but have seen to it that the Auditor ruled properly on issues involving the Plaintiff's "rights to due process". When moved for his dismissal, the Defendant not only failed to rule, but (in effect) excused him from answering the 101 documented allegations of impropriety, negligence, and misconduct and ordered that he continue to rule on the matters before him.

30. The Defendant, as the presiding Judge, was required to rule on Motions, Appeals, and Petitions before the Orphan's Court in that his act was a ministerial act or mandatory duty where there existed a clear legal right in the Plaintiff, a corresponding duty in the Defendant, and want of any other adequate and appropriate remedy. Philadelphia Newspapers Inc. v. Jerome , 478 Pa. 484, 387 A. 2d 425, 430, (1978). Mandamus is a proper remedy when a judge arbitrarily refuses to rule on a motion before the Court. In re School Asbestos Litigation, 997 F. 2d 764, 770 (3 d Cir. 1992). This duty results from the official station of the party to whom it is directed or from operation of law, 18 R.C.L., p. 87 sec. 1 (Lawyers Co-Op 1936), a copy of which was attached hereto in the of the Complaint

for the Court's reference and was cited in Goodman v. Meade, 60 A. 2d 579. Mandamus is appropriate in that the Defendant is not being asked to rule in any particular manner, but to rule, and, hence, no discretion is involved in his decision Dechert v. Commonwealth , 113 Pa. 229, 6 A. 229, 231 (1886). Here there are specific well defined legal rights to enforce i.e. the right of the Trustee to have a necessary Court docket; necessary rulings on decided issues; and full evidentiary hearings to protect her " due process rights " Goodman v. Meade, 162 Pa. S. 587, 60 A. 2d 577, 579 (1948). There is no adequate legal remedy as the right of appeal is non-existent at this time, and if left until after the procedure outlined by the Judge's Order of June 30, 1995, " Justice will be denied".

31. This is an original action for mandamus and has been commenced by the serving of originals of the complaint upon the Defendant and the Office of the Attorney General well within the six (6) month period, running from the filing of the Judge's Order of June 30, 1995, for commencing original actions against the Commonwealth or a governmental unit pursuant to 42 Pa. C.S.A. ss 5522 (b) (1). Township of Bensalem v. Moore, 620 A. 2d 76, 80 (Pa Cmwlth 1933).

32. The Plaintiff's interest in the result is that she as the Trustee of a Pennsylvania Trust can not properly present the surcharge issue without an adequate court docket and rulings on the closed issues , and valuable property rights have been taken away by not ruling on her opposition to the Auditor's payment and his dismissal, and will be taken away by failure to grant " full Evidentiary hearings" on the surcharge issue heard before an impartial unbiased trier of the facts. These interests are distinct from those which she shares with the general public and, hence, render her standing to bring an action against a public official. Donbrouski v. City of Philadelphia, 431 Pa 199, 209, 245 A. 2 d. 238, 244 (1968).

33. The damages sought are as follows and may be irreparable if this Orphan's Court does not rule, for if the witnesses are not allowed to testify and die or become incapacitated, then even if an appeal is later taken, their testimony may be lost forever. The actual damages are the costs of this mandamus action, legal and Trustee fees and, if mandamus is granted the costs of the Writ of Mandamus. Commonwealth v. Keenan ,id. at. 251. If mandamus is not issued, there could be added costs of appeals, which could be substantial In addition, the loss of time may cause further diminution

in value to wasting assets, for a final distribution of the Trust's assets may be further delayed.

34. There is an absence of an adequate legal remedy, for if the hearings are not held now " justice delayed may be justice denied", due to possible death or incapacity of witnesses, as history of this case indicates that witnesses have died or been incapacitated and, hence, mandamus is appropriate. Sewell v. Solomon , 77 Pa. Cmwlth. 199, 465 A. 2d 130 (1983). The Trust has already been depleted of a vast amount of valuable assets through the actions of the biased Auditor, and if allowed to maintain his present course and if there are constant appeals, this may deplete the assets to the point where the objects of the Trust are unfulfilled. If the Defendant is allowed to continue on his course of action and lack of proper disposition of matters before him, justice will never be done. If mandamus is granted, even if the Defendant denies all of the motions, appeal will be possible to an unbiased appellate court and at some future date a hearing may be held before an unbiased trier of the fact, not the biased Auditor or the Defendant.

35. The filing of this mandamus action with the Pennsylvania Supreme Court as the filing of any action with an Appellate Court, suspends until determination by that Court any and all actions or Orders of, a lower Court; i.e. the Defendant's Order of June 30, 1995. In the event that this Court does not grant a Writ of Mandamus (Preemptory or otherwise) on any or all of these matters pleaded herein (and specifically noted as the eight (8) requested rulings in the argument below) that may effect such Order, it is respectfully requested that this Court issue an Order that delays the effect of the Defendant's Order for at least one hundred and eighty (180) days in which to comply with the initial phase of the Defendant's order, in order to file the requisite notices and hold the depositions noted therein; particularly in light of the fact that expert witnesses have busy schedules, and the absence of a proper Court docket, encompassing fifteen (15) years of litigation. In Light of this action for a writ of Mandamus, it would have been an unwarranted use of Trust assets to begin the compliance procedure until this Court makes its determination .

ARGUMENT

The C. A. and Flo B. White Trust has been involved in litigation before the Orphan's Court, presided over by the Defendant for approximately fifteen (15) years. The present litigation started over eight (8) years' ago in 1987, when the participating beneficiaries exceptions were filed to the then Trustees' 1986 accounting, and the Defendant appointed the Auditor to hear these exceptions. His appointments of the Auditor for the exceptions to the 1986 and subsequently the 1992 accountings and hearing the Trustee's and certain non-participating beneficiaries surcharge motions have been vague and certainly not broad in scope as to the Auditor's duties. The Auditor in the eight (8) years that he has presided over these matters in a quasi- judicial capacity has constantly delayed the proceedings (either through his ineptitude and negligence, or due to his deliberate and willful prejudicial bias against the Plaintiff and the prior Trustees), and failed to make any determinations on the participating beneficiaries exceptions to the 1986 and 1992 accountings and other closed issues; i.e. the former Trustee's request for fees. Hearings on the participating beneficiaries exceptions were concluded in June of 1994 and the request for Trustee fees' concluded in December, 1993.

The Auditor has usurped his appointment and the authority given to him by the Court in his original and subsequent appointments and attempted to rule on issues of law reserved for the Chancellor (i.e. the Court), denying the Plaintiffs' Motion for full evidentiary hearings, thereby destroying her rights to both " procedural and substantive due process "

The Defendant has failed to judicially supervise the Auditor, attempting by his inaction and lack of supervision to delegate to him non-delegable functions i.e. those traditionally reserved to the Chancellor (i.e. the Court). While during the early years of this litigation, the Defendant took some interest in the matters before the Court, recently he has completely withdrawn from any meaningful consideration of this matter. Even during the early years of consideration of this case, the Defendant felt that his Court should not have to decide the controversies between the various beneficiaries and the various Trustees. Irrespective of the fact that there were actual controversies that could not be settled by the bona fide efforts of the counsels on both sides over the years, he often stated to counsels that his Court's time would be better spent on other cases that he felt were more meritorious of the Courts' consideration. With this attitude, he might have recused himself from this case, but did not. The record shows that unless literally forced to do so he made no decisions.

However, in the last year, he has failed to rule or issue determinations on pressing matters, and has demonstrated a clear bias against the Plaintiff, by being unwilling to even consider a motion to dismiss Auditor Stern for cause, based upon one-hundred and one (101) well- documented allegations. Due to the Defendants' action or inactions, unless this Court grants mandamus, the Auditor may never have to answer or be accountable to any court. All of this has been adequately presented to the Orphans Court in documents filed with Orphan's Court (see 7, Motion to Dismiss the Auditor for Cause, etc.), and where necessary, briefed by the Plaintiff's counsel.

This is a Trust matter before the Orphans Court which involves substantial property rights of beneficiaries, and the Defendant in his judicial capacity should be especially cognizant of promptly ruling on those matters that effect the rights of beneficiaries, and the ability of the Trustee to adequately fulfill her obligations as a Trustee. It is further noted that the Defendant's actions have overly frustrated and complicated these matters to the point that severe financial losses have been incurred to the Trust assets and a timely Trust termination, now three and a one-half (3 ½) years overdue, has been offset until such time in which the Court makes its final determinations on all of the outstanding issues.

To summarize for this Court, the Defendant has failed to issue rulings and/or determinations in the eight (8) instances noted below; the necessity for which is briefly stated after each issue:

(1) Ruling on Motion for Full Evidentiary Hearings. This is necessary to protect rights to "procedural and substantive due process". This is the most important of the necessary rulings;

(2) Ruling on Motion to Dismiss the Auditor for Cause. The Auditor or trier of the facts should be replaced for clear bias, negligence and wilful misconduct in office, and not allowed to continue to hear this matter, let alone be compensated for such actions; or the Court should deny the motion thereby allowing an appeal, not tell him to continue;

(3) Rulings on surcharged beneficiaries exceptions to the 1986 and 1992 accountings and former Trustee Raymond E. Whites' request for payment of fees and expenses. This request was made by

the prior Trustee, being that the Trust, partly through the Defendant's actions in delaying these matters, and not giving final determinations on the outstanding issues did not allow the trustee to terminate the Trust at the original appointed date of March 21, 1992. This fact forced the Trustee to spend further time and energy as Trustee beyond a date originally agreed upon at the origin of the Trust document. In addition, he was required to perform actions not normally performed by a Trustee in his capacity as a Trustee. These are closed issues; determinations are necessary to present the surcharge issue.

(4) Rulings on Request for a proper court docket. No meaningful, accurate docket is available. Nancy Liebkicher, clerk of the Orphan's Court, in correspondence of November 1994, cited that indeed there was no Court docket covering the years 1980 to 1993 (see Addendum 11). The Orphan's Court records are almost non-existent, meaningful portions are missing, and the Trustee is trying to compile an adequate court docket (being that the Defendant has not ruled on her petition for such), and has received no aid from the Defendant in doing so (even though the good offices of the Court have been requested to aid her). To the contrary , the Trustee has been hampered by the Auditor in reviewing the Court records, and the Defendant has done nothing to prevent this. A proper court docket is necessary to prepare the surcharge issue.

(5) Ruling on Petition for Withdrawal and Second Rehearing on Payment of Auditor's fees. The Plaintiff has never had her day in Court, and substantial property rights of the Trust and its beneficiaries have been taken away without any hearing. The Auditor has all of his money , and no appeal right presently exists, as there have been no rulings.

(6) Appeal of Extension of Time to File Material with Auditor. The Defendant has completely ignored the existence of this Appeal in his Order of June 30, 1995. This is necessary to fix a realistic meaningful schedule to present the material to the Court;

(7) Rulings on timeliness of Attorney Snelbaker's" fly by night answer", and the legal positions stated in attorney Binder's Reply and Memorandum of Law concerning the filing of the surcharge motions, and the need for amendment of the surcharge motions of the Trustee and the non-participating beneficiaries. Even if the timeliness issue is waived by the Court, attorney Snelbaker's Answer is unfounded in law and should be stricken, and the

Defendant herein should answer and give guidance concerning any need for amendment of the surcharge motions in order to proceed with these issues;

(8) Rulings on lack of Response to Memorandum of law of attorney Binder on payments to prior Trustee Raymond E. White, and tax consequences of proposed final distributions by the trustee. The allegations in motions filed stated that attorney Snelbaker's failure to respond constitutes an admission. Neither attorney Snelbaker nor the Defendant have dealt with this. By cutting off the motion before an answer was due, the Court allowed defense counsel Snelbaker's unfounded assertions to stay in limbo, and cut off the right of the Plaintiff to have her counsel's Reply answered by attorney Snelbaker.

All of the above issues have been presented to the Defendant for rulings and, where required (as noted above), adequately briefed for the Court. Furthermore, rulings on all outstanding Petitions, Motions, and Appeals are necessary so that Trustee can proceed to the final distribution of Trust assets, since the last beneficiary became of age in 1992. The Trustee feels that she can not terminate the Trust without them. These Motions, Petitions, and Appeals have all been completely ignored by the Defendant, who has predetermined to have the Auditor run the case completely the way he wants (contrary to Court Procedural Rules). The Defendant will not give head to anything that the Plaintiff or her Counsel(s) wish to present to the Court. This appears to be very much akin to the " Court of Star Chamber ", outlawed by the Bill of Rights and the U.S. Constitution, and clearly violative of "due process" of law, under the United States Constitution.

The issues presented in this case calling for mandamus as the only possible remedy were set forth by this Court in the leading case of Comm. v. Keenan, supra allegation # 20, which involved a case of the president judge of the Court of Common Pleas of Westmoreland County, failing to decide thirty-six cases, some of which had been pending before the Court less than the time that many of the aforesaid motions have been pending before the Defendants' Court; In fact, two of the cases in the Keenan case had only been pending for approximately four (4) months prior to the Petition for Writ of Mandamus being filed, while in our case, the oldest of our motions (as noted in allegation # 6 above) were filed in January, 1987, about nine (9) years prior to this mandamus complaint being filed.

Moreover, the Defendant, as noted above, made it clear in his June 30, 1995 Order that he had no intention on ruling until some indefinite future date and only then if he felt that it was necessary.

This Court in the Keenan case, id, 33 A. 2d, at 250, points to the long history of the writ of Procendi or mandamus, stating that a writ of mandamus issues out of the kings bench equity jurisdiction of this Court where judges delay the parties when they do not give judgement, either one way or the other, in cases where they ought to do so.

This Court in the Keenan case, id, 33 A 2d at 249, citing to Article I ss 11 of the Pennsylvania State Constitution, further held that " justice" delayed may be justice denied", for it may prejudice or deny a suitor's rights. This provision restates section 40 of the Magna Carta (1215 A. D.) which provides:

" To none will we sell, to none will we deny, or delay, right of justice." (Emphasis added")

The fact that the right to have justice administered without delay is a fundamental right that should not be infringed upon unless no other course is reasonably possible, was reaffirmed by this Court in Exton Drive In. v. Home Indemnity Co.,436 Pa. 48, 261. A. 2d. 319. (1970); U.S. cert. den. 400. U.S. 819.

This Court went on to state in the Keenan case, id. 33 A. 2d. at 244:

" The failure of a judge to perform promptly the duties of his position, unless he is prevented from doing so by substantial illness or by other circumstances over which he has no control, is one of the most grave breaches of that fidelity which every official owes to the sovereignty he is chosen to serve." [Emphasis added].

Not only did this Court feel that mandamus was the proper remedy in the Keenan case, but ordered compliance with its preemptory writ within sixty (60) days after issuance, with costs of the writ to the Defendant, Judge Keenan; and, if the Defendant did not comply then an attachment would be issued against him, Id. at. 251.

While in the Keenan case, Id. at 246, the petition for writ of mandamus had referred to the section 4 Rule 93 of the Supreme

Court of Pennsylvania which then provided that the presiding judge or the chief judge of the lower Court had to report to the Chief Justice of the Supreme Court the cause of delays in all cases pending for over thirty (30) days, this provision no longer exists under Pennsylvania law.

However, under present Pennsylvania statutory law, a judge must keep a record of all matters pending before him, and is required to submit to the Court Administrator of Pennsylvania a monthly record of " all matters submitted to such judge for decision and undisposed of for sixty (60) days or more, explain briefly the cause of the delay as to those matters, and state the approximate date of his final decision". This appears to have replaced the former section 4 of Rule 93 of the Supreme Court.

Moreover, the holding of the Keenan case, turns not on the statute (which was primarily meant as a control and reporting measure to alert the Supreme Court to the cause of delay in certain cases, and secondarily enforced as a punitive measure as in the Keenan case, where a judge had completely abused his discretion), but on the fact as the Court states that judge Keenan " has been and is unlawfully delaying justice", Id., at 250, and thereby prejudicing a suitor's rights in violation of Art. 1 Sec. 11 of the Pennsylvania state constitution, Id. at 249.

Judge Keenan stated that his ill health prevented him from hearing the cases, but supplied no evidence as to the nature of his health, and the Court apparently did not believe that this defense was meritorious and stated, in pertinent part, on page 249 of the Keenan case.

"*** We adjudge the illness pleaded to be of such a self inflicted nature as to afford no excuse whatsoever for the pleader's failure to perform the duties which he was elected to perform , which he took an oath to perform, and which he is paid to perform"
[Emphasis added]

In the case at issue, the Defendant in the second paragraph of apparently the second page of his Memorandum of June 30, 1995 (as noted above in allegation #20 above), alludes to the fact that he does not have adequate time to hear this case, but like judge Keenan does not specify how many other more important cases or other pressing court business is preventing him from carrying out the duties

that *(1) he was elected to perform; (2) took an oath to perform; and (3) which he was paid to perform* .

Perhaps, Judge Quigley's lack of time to hear this case (particularly in light of his long history of not wishing to deal with this case unless he was literally forced to do so) is of *such a self-inflicted nature.*

As noted in allegation #30 above, the right of mandamus exists when (a) the act to be performed is a ministerial act or mandatory duty, where (b) there exists in the Plaintiff a clear legal right, (c) a corresponding duty in the Defendant, and (d) want of any other adequate and appropriate remedy. Philadelphia Newspapers Inc. v. Jerome , id. 387 A. 2d. at 430 cited in allegation # 30 above. The Philadelphia Newspapers case involved complex constitutional issues concerning the rights to access to pre-trial judicial proceeding in a criminal case, which are not the issues in our case. However, this Court on page 432 et. seq. of the Philadelphia Newspapers case discusses in detail what constitutes the type of clear legal right in the Plaintiff that the court will protect.

The Keenan Case, above, clearly indicates that the act of a judge in ruling upon cases is a mandatory duty under Pennsylvania law. This extends to motions as well, as was noted in allegation # 30 above, citing to the School Asbestos case, 997 F. 2d 770. Hence, condition (a) of the previous paragraph is present.

In the Philadelphia Newspapers case, this Court did not find that the Plaintiff had a clear legal right to open access to the pre-trial court proceeding, but one that must be balanced against the criminal defendants' right to a fair trial and, hence, mandamus did not lie. In our case, to the contrary, it is the Plaintiff's clear constitutional rights of "procedural due process" under the 4th and 14th amendments to the U. S. Constitution that prevent the state from taking away the rights to present and confront witnesses at an open hearing. The Defendant is taking away these rights by his failure to rule. The U. S. Supreme Court has consistently held that when parties are denied access to an effective court process they loose their rights to " due process". Boddie v. Connecticut, 401 U. S. 373, 91 S. Ct. 78., 28 L. ED. 2d. 113 (1971). [see #8, Memorandum accompanying Motion for Full Evidentiary Hearings, page 43 et. seq.]

The Commonwealth Court of Pennsylvania in Dusquesne

Light Co. v. Pennsylvania Public Util., 96. Pa. Cmwlth. 168., 507 A. 2d. 433 (1986), and Pocono Water Company v. Public Utl . Com'r., 158 Pa. Cmwlth. 41, 630 A. 2 d. 971 (1993), essentially followed the holding of the U. S. Supreme Court in this Boddie case (see 7, Memorandum accompanying Motion for Full Evidentiary Hearings, pages 46-48). This was presented to the Defendant, who apparently did not have the time to read material concerning denial of due process rights, but only chose to say, as noted above, that perhaps these rights may have been violated. If any rights of "due process" have been violated, is it not his duties as an official of the Court to see to it that they do not continue to be violated, particularly by him?

Accordingly, requested rulings on the Motion for Full Evidentiary Hearings # (1) above,, are clear legal rights of the Plaintiff, and the defendant as the presiding judge has a duty to issue the rulings.

Regarding ruling on # (2) above; To Dismiss the Auditor for Cause, the Plaintiff has a clear legal right, as do all of the beneficiaries of the Trust, to have matters decided by a competent, unbiased official of the Court. Any motion regarding his conduct and dismissal must be heard and ruled upon by the Court.

Concerning ruling on the closed issues, #(3) above, after seven (7) years of needless delays by the Auditor, hearings were completed on these issues in June of 1994. The Plaintiff has a legal right to know where she and the Trust stand as to the exceptions filed by the surcharged beneficiaries to the prior accountings, and the former Trustee, Raymond E. White, has a right to know if he is to be reimbursed for services and expenses rendered several years ago; so that Nancy White Vencil, as Trustee, may utilize these determinations to know what fees and expenses she can incur in presenting the surcharge issue. The Defendant as the presiding Judge had a legal duty to rule.

As to the rulings on a proper Court docket # (4) above, Rule 11 (d) of the Juniata / Perry County Rules of Court requires that the clerk of the Orphan's Court shall maintain dockets and ledgers . [Emphasis added]. The Plaintiff is clearly entitled to a proper court docket and the defendant as the presiding judge has a duty to rule on her motion for one, that has been pending since January, 1995, and not force her to hearings and depositions without such rulings.

Concerning the ruling on the Petition for Withdrawal and Second Rehearing on Payment of Auditor's fees, the Plaintiff has a right as the custodian of trust funds to have her motion questioning the fees of the Auditor heard. In cited Pennsylvania case law, this Court stated that in determining the Auditor's fee in proceedings on exceptions to the Trustees account (as the proceeding in this case), the amount of, the character, and volume of work done, nature and difficulty of the work done, nature and difficulty of questions involved, time required and similar elements are to be considered. In re Wilburn's Estate, 334 Pa 45, 5 A. 2d. 325 (1939). (See #8, Memorandum on Motion for Full Evidentiary Hearings P. 10 , and Motion for Second Rehearing , in its entirety). The Plaintiff had a legal right to a ruling and the Defendant a legal duty to rule.

Regarding ruling # (6), the Appeal of Extension of Time to File Material with Auditor, the Plaintiff had a legal right to present her case for a surcharge and consistent with that right was the right to adequately present the evidence to the hearer of the facts. Consistent with this, letters presented to the Auditor and the Court by critical experts indicated that the schedule fixed by the Auditor for submission of evidence to him was unrealistic; especially in light of the absence of a clear and accurate court docket, encompassing fifteen (15) years of litigation, and the Defendant has refused to rule on this. There is clearly a legal right in the Plaintiff, and the Defendant is refusing as the presiding judge to issue a ruling.

Regarding ruling # 7, with regard to requested rulings on the timeliness of attorney Snelbaker's answer to the trustee's surcharge motion, the need for amendment of the surcharge motion, and the reply and Memorandum of Law of Attorney Binder, these go to the heart of the surcharge issue and, accordingly, the Plaintiff has a definite legal right and the Defendant should have issued a determination by ruling.

The Court's failure to rule on the Lack or response to Attorney Binder's Memorandum of Law on issues necessary to terminate the Trust, as noted in # (8) above, allows the Auditor, attorney Snelbaker, and the Court to completely ignore issues vital to this Trust and its termination; particularly since in later papers filed with the Orphan's Court, allegations of the Plaintiff's Counsel asked for deemed admissions and, once again the Court ignored this filing (see).

Article 6, 1. (g), and Article 6.2 (g) of the Juniata / Perry County Rules of Court provide, procedures under which matters requiring argument are filed before the Court. The Plaintiff through Counsel has fully complied with these procedures; which go on to state that: " upon the receipt of all briefs or at the expiration of the time limits imposed , the Court shall without oral argument, determine the issues. " The Defendant has not done so.

In addition, as evidenced by Pa. R. J. A. 1901 (a), the general policy of the unified judicial system is " to bring each pending matter to a final conclusion as promptly as possible consistently with the character of the matter and the resources of the system." The Defendant might say that his course is expedient, but in reality it will unduly delay the matter for over a year in which nothing will be finalized. Prompt rulings would conform to this rule, as it would enable the matters to be settled once and for all.

As noted above in allegation # 22, in the Steccone case, the United States Court of Appeals for the 9th Circuit held that mandamus is the appropriate remedy to compel action by the lower court in the event of failure or refusal of the court to enter judgement when the situation of a case requires, since no remedy by way of appeal exists. 191 F. 2d. 197, at 199. In the Steccone case, a judgement had been issued which the parties and, apparently, the court felt was not a final determination, and was therefore, non-appealable. Our case, is a better case for mandamus in that there has been no ruling at all and, hence, there can be no appeal. Accordingly, mandamus is the only avenue available to the Plaintiff for she can not appeal.

Likewise, in Mellinger v. Kuhan, 388, Pa. 83, 130 A. 2d 154, 155 (1957), this Court held that if there was any adequate, appropriate and specific remedy available, mandamus would not lie. While in the Mellinger case, id. at 155, the Plaintiff could have brought an action for violation of the parking ordinance before a Justice of the Peace, the Plaintiff here, absent this court issuing mandamus, can do nothing but allow more time and money to be spent on depositions that deny her " due process rights", to be considered by a highly biased and inept Auditor , who based upon his past conduct will probably not even read the depositions, and render a recommendation adverse to her position as a result of said biases.

In Hotel Casey Co. v. Ross; 343 Pa. 573, 23 A. 2 d. 737, 742

(1942), this Court stated:

" Although the writ is granted by the law side of the Court, equitable principles largely govern its issuance and it will be granted only *where necessary to promote the ends of justice and where the prayer of the petitioner appeals to the conscience of the Court"* [emphasis added]

This Court then went on to state in the Hotel Casey Co. case, that mandamus will lie to compel and not control the use of discretion.

In our case, we appeal to the conscience of the Court, for if the plaintiff waits until sometime next year (probably the middle to end of 1996) when all of the steps outlined in the Judges Order of June 30, 1995 are taken, she will almost certainly face an adverse decision by a biased auditor, after having spent needless time and money to comply with the Order, witnesses and documents (as in the past) may become unavailable, she will not have an opportunity to confront witnesses before the trier of the fact,, thereby loosing her due process rights, and, at that point it is our understanding that the Defendant will be retiring from the judiciary. This is obviously his intention.

We are not asking for the Defendant to decide the issues in any particular way, only exercise his duty and obligation under law to issue determinations.

This principal of an absolute failure to rule on the part of a judge without sufficient reason, as being an absolute abuse of discretion justifying mandamus, is best exemplified by a Florida case, Flagship National Bank of Miami v. Testa, 429 So. 2d 69 (Fla App. 3 Dist 1983), which cited to the U. S. Supreme Court case of In re Grossmayer, and the 9th Cir. Federal Appeals Court case Steccone v. Morse - Starrett Products (both cited above in allegation # 22), for this principal. (see , Exhibit a copy of the Flagship National Bank case is attached for the Court's reference).

The Court stated, id. 429 So. 2 d. at 70.

" {1} It is a legal shibboleth- and , uncommonly, an accurate one- that while a judge may not be told ahead of time how to rule, mandamus lies to require that he rule one way or the other, if there is

no justification that the ruling be withheld. In re Grossmayer, 177 U.S. 48, 20 S. Ct. 535, 44 L. Ed. 665 (1900); Steccone v. Morse-Starrett Product Co., 191 F. 2d. 197 (9th Cir. 1951), and cases collected at note 5; 52 Am. Jur. 2d Mandamus ss 342, 344 (1970); 49 C.J.S. Judgements ss 101 (1947);*** " [emphasis added].

In the Flagship National Bank case, the judge did not rule because he felt that a jury trial was preferable. The Court found no lawful basis for the judge's failure to rule, and found mandamus to be the only appropriate remedy, as no appeal was possible 429, So. 2d. at 70.

Likewise in our case, there is no legal basis for the Defendant not to rule, and, since an appeal is not possible, as discussed above, mandamus is the only available remedy.

We appeal to the conscience of this Court by mandamus to compel a decision, not control that decision, for while a judge can exercise discretion, the failure to rule at all is an abuse of any discretion.

SUMMATION

As demonstrated above, the Defendant has utilized his office to completely prevent the Plaintiff from obtaining any proper judicial determination of this cause. He has violated clearly defined Court Procedural rules to prevent reply to properly filed motions and denied the plaintiff " due process of law ". He has allowed the matter to be adjudicated by a Court appointed Auditor, whose dismissal has been sought for negligence, ineptness and bias, (backed up by 101 documented allegations and a memorandum of law), without ruling on the Motion for Dismissal of the Auditor for Cause, and, in effect, excusing the Auditor from answering the motion.

Through not ruling he has not fulfilled the duties of his office and completely abused his discretionary powers, as well as violating the Local Procedural Rules of the Juniata / Perry County that require him to make a decision. Through the granting of mandamus this Court can prevent " justice being denied " by " being delayed " .

If mandamus is granted and the Defendant issues negative rulings without considering the merits, at least an appeal will be

possible to an unbiased appellate court, and there will be a possibility that an unbiased trier of the fact (not the biased Auditor or the Defendant) may ultimately hear this case.

Although this action for writ of mandamus is required to be in the form of a complaint under Pennsylvania law, legal argument has been added for the benefit of this Court. While Pennsylvania law is silent in this respect when the action was changed from a petition for writ of mandamus to a complaint for mandamus, other states with similar statutes, such as Florida, permit argument. Rule 1.630 (b) (3). Fla Rul. Civ. Proc. (see , a copy of which is attached for the Courts' reference as exhibit).

The Trustee through her counsels apologizes to and asks this Court's indulgence for the voluminous motions, memorandums and exhibits presented to the Orphan's Court that are to be reviewed by this Court. She did so only because this is a highly complex case, involving a multitude of complex issues presently before the Orphan's Court, which does not have an adequate Court docket and numerous documents are missing from the Court records. Furthermore, it is presided over by the Defendant, who has turned everything over to and does not supervise an inept, negligent and biased Auditor. In addition, the Defendant since 1987, has held no hearings on any major motion; and issued no rulings or determinations. Accordingly, upon the advice of her counsels, she felt that she needed to now make a complete record for review by an appellate court.

PRAYER FOR RELIEF

In light of the clearly demonstrated bias of the Defendant, the Plaintiff prays that this Court issue an Order that the judge recuse himself from this case and that another judge be substituted in his place, and that this Court issue a Writ of Mandamus ordering his replacement to enter decisions on all of the rulings regarding this cause, enumerated herein.

The Plaintiff also asks for this Court in its Order to award damages for court costs, and all other costs of this mandamus action (attorney fees, trustee fees, and all other expenses) , and any and all other relief as this Court may deem equitable.

Due to the complex nature of this case, the Trustee through her counsels, respectfully requests oral argument before this Court prior to a decision being rendered.

In the event that this Court does not grant a writ of mandamus (preemptory or otherwise) on any or all of the matters pleaded herein (as noted in allegation # 35 above) it is respectfully requested that this Court in its Order delay the effect of the Defendant's Order for at least one hundred and eighty (180) days in which to comply with the initial phase of the Defendant's Order of June 30, 1995.

Respectfully submitted,

Dated: October 13, 1995

By:_____/s/_____
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By:_____/s/_____
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APPENDIX G

IN THE SUPREME COURT OF PENNSYLVANIA

THE TRUST OF C.A. AND FLO B. WHITE, BY NANCY WHITE VENCIL, AS TRUSTEE,	)	
Plaintiff	)	CASE: 135 M.D. Misc. Docket 1995
v.	)	
JUDGE KEITH B. QUIGLEY, AS PRESIDENT JUDGE COURT OF COMMON PLEAS 41ST JUDICIAL DISTRICT OF PENNSYLVANIA, JUNIATA AND PERRY COUNTIES, ORPHANS' COURT DIVISION,	)	
Defendant	)	

PETITION TO INTERVENE

TO THE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

Your Petitioners respectfully request:

(1) The Petitioners herein, namely, Brenda White Vick, Nancy White Vencil and George R. White, each an individual named beneficiary of the Trust of C.A. and Flo B. White and not parties in this action, in their individual capacities, by their attorneys, William D. Boswell, Esquire and Mark R. Parthemer, Esquire, of Boswell, Snyder, Tintner & Piccola, wish to intervene, individually, as party Plaintiffs for the following reasons:

(a) In paragraph 1 of the Exceptions and Objections to the First and Final Account of J. Nevin White and Raymond E. White, Trustees, dated August 17, 1992 and filed with

the Clerk of the Orphans' Court on November 3, 1992, a copy of which are attached hereto, incorporated herein by reference, made a part hereof and marked Exhibit "A", your Petitioners, as trust beneficiaries, objected to the expenditures by the Trustees of unspecified legal fees and other expenditures related to litigation matters from the date the Trust was established to the date of filing, incurred to definite unwarranted and unestablished charges made by certain trust beneficiaries against the trust administration and the individual Trustees, alleging unspecified causes of illegal and improper trust administration, all of which were judicially determined to be unfounded by this Court.

(b) In paragraph 1 of said Exceptions and Objections, your Petitioners requested the Court of Common Pleas of Juniata County, Orphans' Court Division, to determine that the substantial expenditure of trust funds to defend all alleged conduct and expenditure of the trust funds be surcharged to the trust beneficiaries who alleged the unspecified charges against the Trustees which required the incurring of such expenditures, as such were a detriment and loss to your Petitioners.

(c) To this date, the Defendant in this action has not held a hearing nor has he caused to have a hearing held before the previously appointed auditor to which he has assigned the duty so as to allow your Petitioners to present their evidence as to the unfounded charges alleged or the basis under which a surcharge should be made against the trust beneficiaries who made the charges against the Trustees in order for your Petitioners to be reimbursed for their losses at the time of the required trust distribution of their respective distributive share for the expenditures made by the Trustees to protect the integrity of the trust administration.

(d) Defendant's failure to afford your Petitioners their right, under due process, to recover the unwarranted expenditures caused by the allegations of certain beneficiaries of the Trustees' wrongdoing, has caused a substantial loss to your Petitioners unless rectified by the issuance of an order of surcharge.

(e) As to the requested surcharge question, your Petitioners could have joined as original parties in the action or could have been joined therein, but as such did not occur, the

requested intervention is proper to afford relief to your Petitioners in order to avoid their loss as trust beneficiaries, which shall be established in a hearing thereon.

(f) Your Petitioners further assert their rights to intervene in support of the Trustee's Motion to Dismiss the Auditor for Cause filed June 26, 1995, and referred to in the Trustee's action for a writ of mandamus, because as beneficiaries of the Trust your Petitioners are directly affected by the bias action and the auditor's failure to make rulings, convene hearings and supply reports to the court, which has forced the Trustees, both former and present, to expend trust assets to protect the Trust by reason of the unwarranted litigation instituted by certain beneficiaries without basis established, with your Petitioners being fully aware of the auditor's action in the proceedings. Your Petitioners adopt Trustee's motion to dismiss auditor for cause.

(g) Your Petitioners are likewise aware of the auditor's motion for payment of auditor's fees and expenses for the period of May 7, 1992 to March 17, 1994, filed on March 22, 1995, which the Defendant, for the court, allowed and directed to be paid, notwithstanding the fact that objections were filed by the Trustee and that no hearing was held on said objections, all of which is contrary to the proper legal procedure as set forth in the Trustee's Complaint for the action in mandamus, which your Petitioners have adopted in this regard.

(h) Your Petitioners, being aware of Defendant's memorandum of June 30, 1995, desire to intervene in support of Defendant's statement contained therein that very possibly the proceedings should be conducted by an assigned Senior Judge who would have more time to devote to the trust issues. Your Petitioners wish to present their position that the voluntary recluse of Defendant and an assignment of a new judge (senior or otherwise) to adjudicate all of the open issues, including the issue of dismissal of the auditor and the issue certain beneficiary surcharges, as requested by both the Trustee and your Petitioners, as individual beneficiaries, would promptly close all of the open issues and permit an orderly distribution of the trust assets to all beneficiaries mandated by the trust agreement, thus terminating this litigation. The due process that has been withheld by the inactivity of the court in its failure to act and rule would be restored in the Trust, the Trustee and the beneficiaries, all of the

parties involved.

(2) If your Petitioners are permitted to intervene, they will file a Complaint, a copy of which is attached hereto and marked Exhibit "B", which will set forth in detail the request of the Petitioners to establish that your Honorable Court should order the Orphans' Court to hold a hearing to rule on the surcharge issue against the trust beneficiaries, who alleged the unspecified charges against the Trustees which required the incurring of substantial expenses and legal fees and other litigation expenditures, all of which were subsequently judicially determined to be unfounded and summarily dismissed, so that by the surcharge order the Petitioners will be reimbursed for their losses at the time when their respective shares of the trust are distributed to the beneficiaries. The Complaint will further state that the Petitioners adopt the Trustee's allegations in the Complaint filed with the Petition to Intervene by the Trust of C.A. and Flo B. White, by Nancy White Vencil as Trustee, filed herein against the Honorable Keith B. Quigley, President Judge of the Court of Common Pleas of the 41st Judicial District of Pennsylvania, Juniata and Perry Counties, Orphans' Court Division, as contained in detail in paragraphs 5-34, inclusive, of Trustee's Complaint, as all such allegations directly affect the Petitioners as trust beneficiaries and none of which have been ruled upon by the original Defendant as a judge obligated to make such rulings in the Orphans' Court Division of said court for an unduly long period of time since the request for ruling had been made by the Trustees, both former and present, of the Trust, all to the detriment of your Petitioners and, thus, participation by them in the issues raised by them in the Complaint in intervention so that your Petitioners may have the due process to which they have been denied in all of the issues. A copy of paragraphs 5-34, inclusive, which are allegations of the Trustee set forth in her Complaint for an action in writ of mandamus, is attached hereto, incorporated herein by reference, made a part hereof and marked Exhibit "C".

WHEREFORE, your Petitioners pray relief to intervene in this action against the said Honorable Keith B. Quigley, Defendant, for relief to file the proposed Complaint in intervention attached hereto, and for such other and further relief as the Court may deem proper.

Respectfully submitted:

BOSWELL SNYDER TINTNER & PICCOLA

By: _____/S/_____
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Attorneys for Petitioners
Date: 11/9/95

APPENDIX H

IN THE SUPREME COURT OF PENNSYLVANIA

THE TRUST OF C.A. AND FLO B. WHITE, BY NANCY WHITE VENCIL, AS TRUSTEE,	)	
Plaintiff	)	CASE #0135 M.D. Misc. Docket 1995
v.	)	
JUDGE KEITH B. QUIGLEY, AS PRESIDENT JUDGE COURT OF COMMON PLEAS 41ST JUDICIAL DISTRICT OF PENNSYLVANIA, JUNIATA AND PERRY COUNTIES, ORPHANS' COURT DIVISION,	)	
Defendant	)	

COMPLAINT
(IN INTERVENTION)

1. This is an action for a writ of mandamus.

2. The Plaintiffs/Intervenors, Brenda White Vick, Nancy White Vencil and George R. White, individually and by their Petition to Intervene filed simultaneously herewith, as intervenors, bring this action against the Defendant and pursuant to Pa. R.C.P. 1091 petition this Court, by and through their undersigned counsel, to issue a writ of mandamus requiring the Defendant, in his capacity as a judge of the Orphans's Court, to issue rulings on petitions, motions and appeals as clarified herein, presently before this Court.

3. The Defendant is President Judge of the Court of Common Pleas, 41st Judicial District of Pennsylvania, Orphans' Court Division, and is the presiding judge of the case of In Re: Trust of C.A. and Flo B. White, No. 34-77-67, presently from 1980 to date, before the Orphans' Court.

4. The Plaintiffs/Intervenors seek, through intervention, to invoke the jurisdiction of this Court through 42 Pa. C.S.A. §721(2), which provides that the Supreme Court shall have original, but not exclusive, jurisdiction in all cases of mandamus to courts of inferior jurisdiction. Jurisdiction is properly in the Supreme Court, in that there is no appeal or other action pending in any lower appellate court. Com. ex. rel. Specter v. Dennis, 10 Commlwlth. 439, 308 A.2d. 915 (1973); and Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia City, 507 Pa. 194, 489 A.2d. 1286 (1985).

5. As set forth below, the Defendant, in his capacity as presiding judge of the Orphans' Court Division of the Court of Common Pleas, has refused to issue rulings on certain motions and appeals, thereby depriving the Plaintiffs/Intervenors of their rights of both "substantive" and "procedural due process." There is no other adequate remedy at law and, accordingly, this action for a writ of mandamus is their only means of protecting their rights as beneficiaries of the Trust of C.A. and Flo B. White.

6. In paragraph 1 of the Exceptions and Objections to the First and Final Account of J. Nevin White and Raymond E. White, Trustees, dated August 17, 1992 and filed with the Clerk of the Orphans' Court on November 3, 1992, a copy of which are attached hereto, incorporated herein by reference, made a part hereof and marked Exhibit "A", your Petitioners, as trust beneficiaries, objected to the expenditures by the Trustees of unspecified legal fees and other expenditures related to litigation matters from the date the Trust was established to the date of filing, incurred to definite unwarranted and unestablished charges made by certain trust beneficiaries against the trust administration and the individual Trustees, alleging unspecified causes of illegal and improper trust administration, all of which were judicially determined to be unfounded by this Court.

7. In paragraph 1 of said Exceptions and

Objections, your Petitioners requested the Court of Common Pleas of Juniata County, Orphans' Court Division, to determine that the substantial expenditure of trust funds to defend all alleged conduct and expenditure of the trust funds be surcharged to the trust beneficiaries who alleged the unspecified charges against the Trustees which required the incurring of such expenditures, as such were a detriment and loss to your Petitioners.

8. To this date, the Defendant in this action has not held a hearing nor has he caused to have a hearing held before the previously appointed auditor to which he has assigned the duty so as to allow your Petitioners to present their evidence as to the unfounded charges alleged or the basis under which a surcharge should be made against the trust beneficiaries who made the charges against the Trustees in order for your Petitioners to be reimbursed for their losses at the time of the required trust distribution of their respective distributive share for the expenditures made by the Trustees to protect the integrity of the trust administration.

9. Defendant's failure to afford your Petitioners their right, under due process, to recover the unwarranted expenditures caused by the allegations of certain beneficiaries of the Trustees' wrongdoing, has caused a substantial loss to your Petitioners unless rectified by the issuance of an order of surcharge.

10. In the Complaint in Mandamus filed October 13, 1995, with your Honorable Court by the Trust of C.A. and Flo B. White, by Nancy White Vencil, Trustee against the Defendant herein, paragraphs 5 to 34, inclusive, are adopted in this proceeding by the Plaintiffs/Intervenors as paragraphs 11 to 40, inclusive, of this Complaint, all of which allegations are set forth in the Trustee's Complaint heretofore filed, entered and docketed by your Honorable Court, a copy of which allegations are attached hereto, incorporated herein by reference, made a part hereof and marked Exhibit "B", as such allegations are hereby adopted by the Plaintiffs/Intervenors herein, as beneficiaries of said Trust, as allegations of the failure of Defendant to hear and rule on the motions, requests and memoranda filed by said Trustee, which deprived the Plaintiffs/Intervenors of their right, under due process, to present to the court their evidence and facts and basis of their damages and losses caused by the Defendant's

failure and refusal to hear and rule on the matters set forth in the adopted allegations, which rulings were requested to assist your Plaintiffs/Intervenors to establish their rights and benefits as such trust beneficiaries under the provisions of the Trust of C.A. and Flo B. White, which is the issue herein.

11-40. See Exhibit "B", which is the Complaint of the Plaintiff/Trustee filed on October 13, 1995, setting forth the allegations at issue, and is adopted by the Plaintiff/Intervenors herein.

41. The filing of this mandamus action with the Pennsylvania Supreme Court as the filing of any action with an Appellate Court, suspends until determination by that Court of any and all actions or orders of a lower court; i.e. the Defendant's Order of June 30, 1995. In the event that this Court does not grant a Writ of Mandamus (preemptory or otherwise) on any or all of these matters pleaded that may affect such Order (summarized herein as eight (8) requested rulings, which are required to be determined by the court to terminate this litigation so that the Trust corpus can be distributed to the beneficiaries as mandated by the trust agreement, the eight (8) requested rulings are set forth and incorporated herein by reference, made a part hereof and marked Exhibit "C"), it is respectfully requested that this Court issue an Order that delays the effect of the Defendant's Order for at least one hundred eighty (180) days in which to comply with the initial phase of the Defendant's Order, in order to file the requisite notices and hold the depositions noted therein; particularly in light of the fact that expert witnesses have busy schedules, and the absence of a proper court docket, encompassing fifteen (15) years of litigation. In light of this action for a writ of mandamus, it would have been unwarranted use of Trust assets to begin the compliance procedure until this Court makes its determination.

WHEREFORE, the Plaintiffs/Intervenors herein respectfully pray your Honorable Court issue an order that the Defendant recluse himself from this case and that another judge be substituted in his place and that this Court issue a Writ of Mandamus Order for Defendant's replacement to enter discussions on all of the issues regarding the causes enumerated herein, together with damages for court costs and costs of this mandamus action and any and all other relief as this Court may

deem equitable.

Respectfully submitted:
BOSWELL SNYDER TINTNER & PICCOLA
By: _____/s/_____
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APPENDIX I

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

THE TRUST OF C. A. AND FLO B. WHITE, BY NANCY WHITE VENCIL AS TRUSTEE,	)	
Plaintiff,	)	
	)	CASE Nos: 135 and 137 M.D. 1995
-vs-	)	
THE PRESIDENT JUDGE, COURT OF COMMON PLEAS, 41ST JUDICIAL DISTRICT OF PENNSYLVANIA, JUNIATA AND PERRY COUNTIES, ORPHANS COURT DIVISION	)	
Defendant.	)	

PETITION FOR RECONSIDERATION OF THE COURT'S ORDER OF THE 10TH OF JANUARY, 1996

AND NOW comes the Trustee, Nancy White Vencil, by her counsels Leonard F. Binder, and Robert S. Mirin, Esq., and respectfully requests that the Court reconsider its Order of the 10th of January, 1996. William D. Boswell, Esq., as attorney for the beneficiaries Nancy White Vencil, Brenda Vick White, and George R. White in their individual capacities (the "Non-participating beneficiaries") joins in this Petition.

1. On June 30, 1995, the Defendant, as president Judge of the Court of Common Pleas 41st Judicial District of Pennsylvania, Juniata and Perry Counties, Orphan's Court Division, issued an Order together with a Memorandum and letter to the Clerk of the Orphan's Court (copies of which have previously been submitted to this Court, as Exhibit # 8 A of the Appendix of the Complaint, referred to in allegation # 2 below) setting forth a procedure for the disposition of case number 34-77-67, involving the Trust of C. A. and Flo B. White,

presently before his Court. In doing so he completely ignored applications for rulings on motions, appeals, and petitions, some of which had been pending before him for over eight (8) years. The Order stated that depositions should be held instead of full evidentiary hearings (thereby denying the Plaintiff her constitutional " due process rights"), and must be completed by October 15, 1995, and lodged with the Auditor, not the Court. This lack of " due process " was the principal basis upon which mandamus was sought from this Court. The Order further stated that briefs were to be submitted by November 15, 1995, to the Auditor not the Court [after a motion for the Auditor's dismissal containing one hundred and one (101) documented and unanswered allegations for the Auditor's dismissal had been made and not heard or ruled upon by the Defendant; another basis for seeking mandamus], thereby indicating that the Defendant had abdicated his judicial function to the Auditor. In the Order of June 30, 1995, all motions, including the Auditors' dismissal, were deferred until after the Auditor filed his report involving the surcharge issue.

2. On October 13, 1995, the Plaintiff, prior to the October 15, 1995 date specified in the Defendant's Order, and well within the six (6) month statutory period under Pennsylvania law for filing original actions against the Commonwealth and its officials or instrumentalities (see allegation #31 of the Complaint, citing Pennsylvania statutory and case law), filed a Complaint in the above action in the nature of mandamus (the " Complaint") with this Court, seeking mandamus in eight (8) instances, alleging serious violations of the Plaintiff's due process rights, and citing the Defendant's biases and disregard for the law (i.e. the need for the Trustee to obtain rulings on closed issues precedent to the hearing of the surcharge issue, but instead the Auditor unreasonably ruled that the Trustee submit all costs, damages, etc., relevant to the surcharge issue, without these rulings and without a proper court docket, and without full evidentiary hearings). The failure of the Defendant to follow proper court procedure in the deliberate disregard of Motions and Appeals thereof opposing the Auditor's fees and a Motion for his Dismissal for Cause, further demonstrate the intentional biased acts of the Auditor and the Defendant.

3. As the Plaintiff noted in allegation #35 of the Complaint, the Defendant's Order was not final and, accordingly, not appealable, as are all of the other Motions that have been brought before him and not ruled upon (i.e. motion for request for full

evidentiary hearings; motion for a court docket; motion for rulings on closed issues precedent to the surcharge issue; motion for dismissal of Auditor for due cause; motion with reference to denial of due process; motion for denial of Auditor's fees; etc.). The extraordinary remedy of mandamus was her only recourse. As was evident from the Complaint, with appendix and exhibits attached thereto, the acts of the Defendant, for which mandamus was sought were numerous, and the issues presented were complex, thereby requiring counsel(s) several months to adequately prepare the Complaint for this Court. Unlike the few decisions of the Defendant and/ or the Auditor, which were not supported by statute or case law, the Plaintiff's counsel(s) presented to this Court a well documented factual and legal basis for seeking mandamus.

4. Pursuant to allegation #35 of the Complaint, the Plaintiff noted that the filing of this mandamus action with the Pennsylvania Supreme Court, as the filing of any action with an Appellate Court, suspends until determination by that Court any and all actions or Orders of a lower Court, I. e. the Defendant's Order of June 30, 1995. The Plaintiff in allegation # 35 of the Complaint stated that for the Trustee to start the deposition process knowing that the mandamus complaint would be filed with this Court would constitute a needless expense of the Trust. These briefs were to be presented to a biased Auditor, whose dismissal had been sought and not acted upon by the Defendant (see allegation #1 above). Likewise, for the Trust through its counsel(s) to file briefs by the Defendant's stated deadline of November 15, 1995, to be presented to a biased auditor whose dismissal had been sought (as noted in allegation # 1 above), before required rulings had been made by the Defendant or evidentiary hearings held on the surcharge issue, would have constituted a further unnecessary expenditure, not to mention further denial of " due process" rights of the present Trustee, the prior Trustees and the four Non-participating beneficiaries.

5. By application dated October 20, 1995, the Plaintiff filed an Application For Leave To File Original Process Pursuant to PA. R. A. P. , Rule 3307 (the " Application"), with this Court.

6. By letter dated October 26, 1995, with accompanying documents, David M. Donaldson, Chief of Litigation of the Administrative Office of Pennsylvania Courts, entered his appearance on behalf of the Defendant, and notified this Court that his office would not be filing a formal response on behalf of the

Defendant. He attached a letter from the Defendant, dated October 17, 1995, to Mary C. Keane, Esq., of the Administrative Office of the Pennsylvania Courts, (together with a Copy of the Defendant's Order, Memorandum and letter to the Clerk of the Orphan's Court, all dated June 30, 1995; referred to in allegation # 1 above), stating that the Defendant stands by the procedure set forth in his Memorandum and Order . No cases, statutes, or other authorities were cited by the Defendant for his position. In the second full paragraph of apparently page two (2) of the Memorandum (as the pages are not numbered), the Defendant stated that it is true that this Judge has made some rulings that some folks might consider to be " from the hip or precipitous", or perhaps " even in violation of due process " (Emphasis added), the very principal reason upon which mandamus was sought from this Court.

7. Neither the letter by Mr. Donaldson nor the Defendant's letter accompanying it indicated any sensitive matter concerning the nature of this case nor any judicial privilege that would require the omission of his name from the caption of this case. In addition, Counsel(s) are unaware of any request by the Defendant to have his name removed from the caption of this case. These are the only papers filed to this date with the Court concerning this case by the Defendant or his counsel. Likewise, to the best knowledge and belief of the Plaintiff and Non-participating beneficiaries counsel(s), neither the Defendant nor any other party (has raised) any sensitive or judicial privileged matter concerning this case.

8. On November 20, 1995, counsel Boswell filed a Petition to Intervene (the "Petition") accompanied by a Complaint (In Intervention) with this Court on behalf of the non-participating beneficiaries. The Petition and Complaint (In Intervention) adopted most of the allegations of the Plaintiff's Complaint, as the non-participating beneficiaries sought mandamus on essentially the same matters as the Plaintiff.

9. By December papers dated December 2, 1995, the Plaintiff filed an Application for a Stay of the Defendant's Order of June 30, 1995, as subsequently reinstated by two Memoranda. These subsequent Memoranda were in response to Motions made before the Orphan's Court by the Plaintiff to have the Defendant's Order stayed, as a matter of the law, which were denied without the Defendant stating any legal authorities. The Plaintiffs' papers, filed with the

Defendant contained full factual and legal authorities for her position.

10. The Order of this Court dated December 10, 1995, granted the Plaintiffs' request for Leave to file the mandamus action, the Non-participating beneficiaries request to intervene, and the request to have attorney Binder admitted Pro Hac Vice. It denied the Application for a Stay, the Complaint in mandamus and the Complaint in intervention. It also stated that the Defendant Judge's name is to be stricken from the caption. This was in spite of the fact that both the Defendant at the inception of the filing of the Complaint and the Prothonotary's's office of this Court had insisted that the Defendant's name be spelled correctly before this case was docketed. The Order was an unsigned per curiam Order four sentences in length. It gave no explanation for any of the decisions. Although counsel(s) had requested oral argument before the Court in order to explain this highly complex case to the Court, no oral argument was granted prior to the decision being rendered.

11. The Complaint stated eight (8) separate instances (some of which covered a period of over eight (8) years in which the Defendant and/or the Auditor had failed to issue rulings), upon which mandamus was sought from this Court (see Complaint pg. 11 et seq.), and submitted in support thereof the factual and legal basis (supported by Pennsylvania statutory and case law, and federal and sister state cases) fully documenting the reasons for granting mandamus. It cited numerous instances of Court irregularities and violation of state and county procedural rules by the Defendant and the Auditor. Most importantly, it (as numerous memoranda and other papers filed before the Defendant) pointed out to this Court serious violations of "procedural and substantive due process" under the U.S. Constitution.

12. After establishing proper jurisdiction of this Court to hear this mandamus action, the Complaint clearly demonstrated the elements necessary for mandamus to be granted in all eight (8) instances in which it was sought from this Court.

13. In Replies to Answers filed by attorney Snelbaker on behalf of the participating beneficiaries, counsel(s) for the Plaintiff further enlarged upon the arguments stated in the Complaint.

14. The filing of this Petition for Reconsideration under P.R.A.P., Rule 3814 constitutes an appeal of the decision of this

Court and as such under P.R.A.P., Rule 1701 (a), after an appeal is taken, the trial court may no longer proceed further in the matter. It suspends all action by the Auditor and/or the Defendant until this honorable Court issues its determination upon this appeal in this case.

15. Although it is counsel(s) position (as stated in allegation #13 above), that neither the Auditor nor the Defendant may proceed in this matter until this Court issues its determination, nevertheless since only this honorable Court as the highest Court of this state can finally determine the law in its state, and since this is a Petition For Reconsideration of all of the matters decided adversely to the Plaintiff and the non-participating beneficiaries in the Court's Order of December 10, 1995, counsel(s) respectively request that this Court issue a Stay of the Defendant's Order of June 30, 1995, (as reissued by his subsequent Memoranda). The reasons for a Stay were fully supported by both fact and case law in the Application for a Stay dated December 2, 1995, and the Plaintiff's Reply (filed with this Court on January 2, 1996) to attorney Snelbaker's Answer to Plaintiff's Motion for a Stay (both of which are hereby incorporated herein and made a part hereof). This re-application for a Stay under P.R.A.P. Rule 1732 (a) is itself an appeal of the Order denying the Stay and, accordingly, suspends all action below until its determination by this Court. This appeal, as the original motion for a Stay, requests a Stay nunc pro tunc of the original Order of the Defendant of June 30, 1995, as subsequent reinstated. A copy of the proposed Stay is attached hereto as Exhibit "A"

16. Counsel(s) for the Plaintiff and the non-participating beneficiaries respectfully renew the request contained in allegation #35 on page 10 of the Complaint that in the event that this Court does not grant this appeal and issue mandamus, the Order of this Court delay the effect of the Defendant's Order of June 30, 1995 (as subsequently reinstated by his memoranda) for at least one-hundred and eighty (180) days, or such other period as this Court may deem equitable. Counsel(s) submit that the requisites of " fundamental due process" require that, pending further appeal, the Plaintiff and the non-participating beneficiaries should be given an opportunity to submit a brief under protest concerning the matters raised in attorney Snelbaker's brief of November 15, 1995.

17. Counsel(s) respectively renew their request that oral argument before this Court be granted before this Court renders a decision on this Petition for Reconsideration.

ARGUMENT

Although mandamus is an extraordinary remedy, all of the elements justifying its issuance by this Court are present.

As this Court in its Order of January 10, 1995, granted leave to file mandamus, the issues of jurisdiction, proper parties, statute of limitations, proper court and proper service upon all required parties are not denied and at issue before this Court. The only issue is the granting of mandamus.

In order for mandamus to be issued it must be shown that the Defendant as the presiding judge was required to rule on Motions, Appeals, and Petitions before his Court in that his act was a ministerial act or mandatory duty where there existed a clear legal right in the Plaintiff, a corresponding duty in the Defendant, and want of any other adequate and appropriate remedy. Philadelphia Newspapers Inc. v. Jerome, 478 Pa. 487, 387 A. 2d 425, 430 (1978)

Mandamus is a proper remedy when a judge arbitrarily refuses to rule on a motion before the Court. In re School Asbestos Litigation, 997 F. 2d 764, 770 (3 d Cir. 1992). This duty results from the official station of the party to whom it is directed or from operation of law, 18 R.C.L., p. 87 sec. 1 (Lawyers Co-Op 1936), a copy of which was attached in the appendix of the Complaint for the Court's reference and was cited in Goodman v. Meade, 162 Pa. S. 587, 60 A. 2d 579, [1948]). Mandamus is appropriate in that the Defendant is not being asked to rule in any particular manner, but to rule, and, hence, no discretion is involved in his decision. Dechert v. Commonwealth , 113 Pa. 229, 6 A. 229, 231 (1886). Here there are specific well defined legal rights to enforce i.e. the right of the Trustee to have a necessary Court docket; necessary rulings on decided issues precedent to the surcharge; and full evidentiary hearings to protect her " due process rights ", along with the rights of the prior Trustees and the four Non- participating beneficiaries. Goodman v. Meade, 60 A. 2d 577, at 579. There is no adequate legal remedy as the right of appeal is non-existent at this time, and if left until after the procedure outlined by the Judge's Order of June 30, 1995, " Justice will be denied".

The above paragraph, essentially # 30 of the Complaint, states all of the necessary criteria for the Court to grant mandamus and the Argument portion of Complaint (which is incorporated herein

and made a part hereof) shows the elements that support it in each of the cases in which mandamus was sought from this Court. The Plaintiff pointed out in great detail the similarities in this case with that of the holding of this Court in Commonwealth v. Keenan, 347 Pa. 574, 33 A. 2d. 244 (1943) where, in a case involving the failure of the President Judge of the Court of Common Pleas to issue rulings and determination over a period of time less than eight (8) years involved in our case, the Court issued mandamus. The only difference in the two cases is that in the Keenan case multiple cases with multiple Plaintiffs involved, whereas in our case there are two cases with essentially six (6) plaintiffs. However, justice can be denied and warrant mandamus when one (1) or one hundred (100) parties are involved.

On page 15 of the Complaint the plaintiff goes into extensive detail as to the constitutional basis (citing to U.S. Supreme Court and Pennsylvania cases), based upon which it is clear that "due process" has been denied. This issue of constitutional lack of "due process" will not go away due to a failure of decision by this Court and will be found in numerous other cases now and in the future before this Court.

It is the duty of the highest court of a state to decide upon issues involving universal importance to the citizens of a state; especially when they involve questions of deprivation of constitutional " due process" that have not been decided before in that state. For a state court to abrogate its function to possible costly later appeal to the federal court system denies justice, which may come too late or never.

There is an overriding constitutional issue that transcends this case and this Judge; i.e. one that will become increasingly more apparent as government continues to enlarge its functions and its regulation of private interests. This issue was discussed at great length starting on page 48 of the Memorandum accompanying the Motion For Full Evidentiary Hearings (which was attached as part of appendix exhibit #8 of the Complaint). It is whether the state through the actions of its Courts can take away " procedural due process rights" to a hearing, in a private matter involving private property rights between private parties, where the state is not denying a party the benefit of public funds or other benefits of a public nature.

Two states , California in an actual appellate Court decision

and Montana in dicta in a Supreme Court decision, hold that the state can not deny the " procedural due process right" to a hearing. In Re Buchman's Estate, 123 Ca. 2d 546, 267 P. 2d 73 (Dist Ct. of Appeal, 2nd, Div. 3 (1954); and In Re French's Estate, 137 Mt. 347, 351 P. 2 D. 548 (1960) [copies of which were attached as Exhibits "I" and "K" to the above stated Memorandum].

In both of the above cases cited the appellate Courts decided that in failing to grant adequate hearings to an executor of an estate " procedural due process" had been violated.

The Defendant chose not to even read the above cited Memorandum and cases, and this Court has to date apparently failed to consider them, as well as the extensive arguments concerning lack of both " substantive and procedural due process", cited in the Memorandum.

The Plaintiff and the Non-consenting beneficiaries are not asking this Court to decide the difficult constitutional and procedural issues submitted, only to issue mandamus so that if the Orphan's Court does not adequately deal with them there will at least be an appealable issue. By denying them mandamus this Court is denying them their day in Court, perhaps for ever.

If ever a case compelled the issuance of a writ of mandamus it is this case. For this Court to condone the unlawful and biased actions of the Defendant and the Auditor (as noted above and further amplified in the mandamus complaint), and to deny mandamus without even an opinion citing its reasons is a manifest denial of justice. This is a long and complex case and a fully structured decision by the Court would be helpful to all parties. Unfortunately neither the Defendant nor the Auditor cited any legal authorities for their positions; and neither does this Court.

In addition, the Plaintiff and the Non-consenting beneficiaries do not understand why the Court has stricken the Judge's name from the pleadings. This coupled with no full legal opinion for the decision leaves the Plaintiff and the Non-consenting beneficiaries greatly concerned with the judicial process.

In this regard P.R.C.P., Rule 1094 (a) relating to an action in mandamus states:

" (a) When an action is commenced to compel performance of a public act or duty by a political subdivision of the Commonwealth, it shall be sufficient to name as defendants such officers in their official capacities as are concerned in the act or duty." (Emphasis Added)

In light of the above, it would appear that the above quoted Rule requires the naming of the judge in his official capacity. Query is this provision not the law? Why does this Court abrogate from this provision?

Lastly, the reasons for a Stay have been extensively dealt with in the Application For A Stay, and are equally applicable now.

PRAYER FOR RELIEF

Wherefore the Plaintiff and the Non-Consenting beneficiaries pray that this Court reconsider its Order of January 10, 1996 and grant mandamus as requested, allow the Complaint in Mandamus, and issue a Stay nunc pro tunc until this Court issues its decision.

The Plaintiff and the non-consenting beneficiaries also ask this Court in its Order to award damages for the Court costs, and all other costs of this mandamus action (attorney fees, trustee fees, and all other expenses), and all other relief as this Court may deem equitable.

Due to the complex nature of this case, the Plaintiff and the non-consenting beneficiaries request oral argument before this Court prior to a decision being rendered.

In the event that this Court does not grant a writ of mandamus it is respectfully requested that this Court delay the effect of the Defendant's order for at least one hundred eighty (180) days or such other period as the Court may deem equitable.

Respectfully Submitted,
/s/
Leonard F. Binder

By:_____/s/_____
January 17, 1996

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APPENDIX J

United States Court of Appeals
for the Third Circuit

THE TRUST OF C. A. WHITE AND FLO B. WHITE, BY NANCY WHITE VENCIL AS TRUSTEE, Petitioner	) Petition For Writ of) Mandamus; Petition) for Removal of Audit) Procedures of 1986 and) 1992, (3/19/81 thru
v.	) 7/1/92), as) supplemented by
[KEITH B. QUIGLEY], as PRESIDENT JUDGE Court of Common Pleas, 41st Judicial District, Juniata and Perry Counties, Orphan's Court Division [and the Auditor Daniel N. Stern] Petition of Brenda White Vick, Nancy White Vencil and George R. White	) further actions thereto) to date), from Orphan's) Court, of Juniata) and Perry Counties,) Pennsylvania, to) Federal Court; and [ ) Federal actions under) 5th and 14th)Amendments; and) possible action under) 28 U.S.C.A.ss 1983.

PETITION FOR WRIT OF MANDAMUS (and Other Matters)

The Trust of C. A. White and Flo B. White, by Nancy White Vencil, Trustee, and Brenda White Vick, Nancy White Vencil, and George R. White, individually, hereby petition the Court for a Writ of Mandamus, reversing the Order of the Pennsylvania Supreme Court by Order dated January 10, 1996, denying the Complaint in Mandamus, and the Petition to Intervene in such action, as further denied by the Order of said Court of March 18, 1996, denying the Petition for Reconsideration filed on January 17, 1996. In addition, as corollary actions hereto, the Petitioners hereunder petition the Court to remove the Audit Procedures of 1986 and 1992, and all actions incident thereto from the Orphans' Court of Perry and Juniata County Pennsylvania to the Federal District Court for the Middle District of Pennsylvania. The Petitioners herein as a corollary action, further file a Complaint under 28 U.S.C.A. ss. 1983 against Judge Keith B. Quigley and Auditor, Daniel N. Stern, of the Orphans' Court of Perry and Juniata Counties Pennsylvania, both in their official capacities and individually.

As a basis for all of the above actions, the following facts and allegations, respectfully apply:

I. Jurisdiction in the Federal Courts as to Mandamus Action:

1. The jurisdictional basis for an action in the Federal Courts of violation of the Plaintiffs and other parties hereunder "due process" rights lies in 28 U.S.C.A. ss 1331 (a copy of which is attached hereto as Exhibit W-1), which authorize jurisdiction in the Federal District Court "of all actions arising under the Constitution, laws, or treaties of the United States".

2. This action is being brought in the Third Circuit Court of Appeals in that, it is unclear as to what relief the Federal District Court can now render in Mandamus actions, which pursuant to Rule 21(a) of the F. R. A. P. (a copy of which are attached hereto as Exhibit W-2), must be brought before the Federal Circuit Courts of Appeal.

3. The "due process" requirements as to substantial fairness to the Defendants are met in that they reside in the judicial district where the applicable Federal Courts sit or have jurisdiction. Accordingly, the Defendants are subject to services of process in the Middle District of Pennsylvania.

II. The facts specifically applying to Mandamus, and generally applying to all actions hereunder, are as set forth below. The Petitioners and the Counsels hereunder acknowledge that this document is extremely lengthy, however the age of the Trust involved, the substantive and procedural issues, and the ongoing factual developments compel the length of this Petition.

1. The C. A. White and Flo B. White Trust (the " Trust") is an inter vivos Trust settled by the late C. A. White and his wife, Flo B. White, on December 13, 1965 (a copy of which is attached hereto as Exhibit "A").

2. The Beneficiaries of the Trust were the Settlors' thirteen (13) grand-children, all of whom are presently living.

3. The original Trustees of the Trust were the Settlor ("C. A. White"), the Juniata Valley Bank (the "Bank"), the Settlor's two sons, Raymond E. White ("Raymond") and Nevin J. White ("Nevin"), and his son-in-law, the late Roy A. Wingate ("Roy"). All

of the original Trustees are no longer Trustees (having either resigned or died), with Nancy White Vencil ("Nancy"), the daughter of Raymond (and herself a beneficiary), being the sole present Trustee, whose appointment as Trustee was confirmed by Judge Keith B. Quigley, the president Judge of the Orphans' Court for Juniata and Perry Counties, Pennsylvania.

4. The Trust Agreement granted the Trustees broad discretionary powers in that the Trustees could (1) self-deal, (paragraphs 4 (g) and 4 (d)), (2) invest and reinvest the Trust assets without consent of any interested party therein (I. e. the beneficiaries), (paragraph 4 (p) and without the necessity for Court approval, paragraph 4 (g)), (3) control administration of the Trust assets (paragraph 5), (4) keep the Trust assets undivided for the period of the Trust (paragraph 4 (o)), and (5) were not entitled to compensation until the Trust terminated by it's own term on March 21, 1992 (paragraph 10 and 1 (a) and (b)).

5. Since the inception of the Trust, and throughout the entire period of the Trust's administration, there were always conflicts in investment philosophies between the four family (individual) Trustees, who were professional lumbermen, and the one corporate (the Bank) Trustee. Raymond White ("Raymond"), one of the Trustee's, was an successful businessman, who like his father C.A., had made very astute investments in lumber, timber ground, stocks, commodities, and foreign currencies. He had a keen eye for a good buy; and, had his numerous recommendations been approved, the Trust assets would have more than quadrupled today.

6. The Bank, for self-serving reasons, and out of a lack of adequate knowledge concerning the recommended investments, vetoed these profitable investments.

7. In addition, the Bank customarily acted as the liaison Trustee for the majority of the Surcharged (Consenting) Beneficiaries, since many of them, due to bad blood in the family and unfounded family hatreds, did not speak to the family Trustees.

8. The Bank due to its lack of knowledge of the lumber industry (to which the majority of Trust assets were timber ground) and its hindrance in the day to day operations of these assets, coupled with their vetoing of Raymond's profitable investments, caused Raymond and his brother Nevin, another Trustee, to request that the

Bank resign as Trustee.

9. The Bank did not inform the Consenting Beneficiaries as to the real reason as to why their resignation was being requested, and in the Spring of 1980, two of these beneficiaries (John and Kenneth King) filed petitions to remove Raymond as Trustee and stop the Bank from resigning. One petition (Kenneth's) was dismissed. In the Spring of 1981, the Orphans' Court denied the remaining petition. The Supreme Court of Pennsylvania upheld that decision in November 1994 (see Exhibit L attached hereto). Accordingly, the Bank resigned, leaving only two Trustees remaining, Raymond and Nevin, for Roy Wingate, the third Trustee, had died in 1982.

10. In 1981, the Consenting Beneficiaries, angered at the fact that the Orphans' Court had allowed the Bank to resign and Raymond to continue as Trustee, started a pattern of continual and harassing litigation against Raymond and Nevin, with Raymond being their primary target since he was the most vocal in stating that the Bank should resign.

11. In addition, in 1981 after the Bank had resigned, the remaining Trustees (Raymond, Roy, and Nevin) attempted to enforce a property division, that was agreed upon by them as individual Trustees, and also as one-quarter owners, of a tract of land in Centre County Pennsylvania, with the Trust owning the remaining one-quarter interest. This division was originally proposed in the late 1970's by these very same three individual Trustees in a desire to partition the property, so as to cut the gypsy moth infested timber on it. The Bank, then, in the late 70's, used its one vote to stop this proposed division, erroneously alleging self-dealing on the part of the family Trustees while it was they who were self dealing, for they sought to sell the massive timber ground tract (5,000 acres) in order to collect a substantial sales commission. Since the three family Trustees would not permit the land to be sold, the Bank vetoed their proposed division, and therefore, no cutting was permitted. As a result, the owners, including the Trust, sustained unnecessary and excessive losses in diseased timber.

12. Now, that the Bank was no longer a Trustee, the remaining Trustees again attempted to divide the Centre County land in accordance with their original proposed division, but this time, they were stopped by the Consenting Beneficiaries' threat of suit. This

threat forced the Trustees to seek Court approval; and what ensued was a three year litigation battle, in which certain of the Consenting Beneficiaries, who were not involved in the Appeal of the Bank's resignation and Raymond's Trusteeship, filed numerous exceptions to the Trustees' proposed land division. A Master, was appointed to oversee this matter, and he summarily recommended the Trustees' division be adopted and approved by the Court.

13. Since the Consenting Beneficiaries were again unsuccessful, they filed another petition in December 1985, re-asserting their previously denied arguments that they used in the land division proceedings that stated, that since they were of age (30 years old), they should receive their remaining Trust assets (undivided interest in Trust timber ground) even though the Trust legally was not to terminate until March 21, 1992. This argument was rejected by the Master in the Centre County land partition; but, it appears that the very Court that sustained the Master's Report (the Defendant's Court), having either forgotten or apparently was not familiar with all of the particulars of these parties (Consenting Beneficiaries) exceptions to the Master's Report, allowed this Motion to be brought forth. The Court never formally acknowledged the content of that Motion, except for the one request to file a Trust accounting. Accordingly, the Trustees, Raymond and Nevin, responded by filing an accounting (the 1986 account) encompassing the years from 1981 to 1986.

14. The Consenting Beneficiaries responded, in January of 1987, with two sets of exceptions to the '86 accounting. These exceptions, as were the numerous other exceptions and motions filed by them since 1980, were unwarranted and without merit; and, some of those exceptions were the very same costs, etc., that the Orphans' Court, in 1981, or the Master, in the mid 1980's, had previously ordered that were to be paid by the Trust, while others were for the litigation fees that were necessary for the Trustees' successful defense of the Consenting Beneficiaries' continual and unwarranted litigation that had been forced upon the Trust.

15. On January 20, 1987, the Orphans' Court appointed an Auditor, Mr. Daniel Stern, to oversee these exceptions to the '86 account. After the original 1980-1981 hearing before it, the Defendant's Court had refused to personally oversee any further matters regarding this Trust or the Consenting Beneficiaries' litigation against it.

16. The Auditor allowed nearly a year to pass before giving notice of the first hearing that was to be held on February 24, 1988. Little was addressed or settled in that hearing, or in the following hearing held on April 28, 1988, in which only one of the two sets of exceptions was formally addressed. Furthermore, as a result of the Auditor's continual oversights in not scheduling timely hearings and in opposing Counsel's failure to pursue these issues in a timely fashion, the exceptions to the 1986 account were never fully disposed of until summer of 1994, seven years after the filing of these exceptions. This fact kept the Trust from terminating on time and caused needless and excessive legal expenditures to the Trust and the Petitioners thereon.

17. The Trust Agreement cites Trust termination as being the 30th birthday of the youngest beneficiary, March 21, 1992. Accordingly, the Trustees, on August 17, 1992, in hopes of finally terminating the Trust, filed an accounting encompassing the period from the '86 accounting through July 1, 1992 (the '92 accounting), even though the Auditor had never properly disposed of, or even addressed both of the sets of exceptions to the '86 account, nor rendered a ruling (recommendation) thereon.

18. The Consenting Beneficiaries responded with the usual exceptions, and filed three (3) separate sets of exceptions to the '92 account.

19. On November 4, 1992, in an attempt to stop the Consenting Beneficiaries ongoing litigation that had kept the Trust from a timely termination and caused excessive losses to the Trust's assets, the Non-Consenting Beneficiaries filed, for the first time, exceptions to the '92 account, in which they requested the Court to surcharge the Consenting Beneficiaries for the damages, costs, etc., as a result of the their unsuccessful litigation against the Trustees, and proposed a majority (beneficiaries) agreed upon final distribution of the Trust assets. The prior Trustee filed a similar Motion to Surcharge the Beneficiaries on December 16, 1993.

20. The Court appointed Auditor Stern to oversee the exceptions to the '92 account, and the Trustee's Motion to Surcharge Beneficiaries, along with the Trustee's Request for Fees filed on September l, 1993.

21. When the Petitioners herein complained of the

Auditor's improper actions with regard to not properly overseeing these matters (See Exhibits 8C-IV and 8C-VI of the Mandamus Complaint, Exhibit E attached hereto), the Court responded with a refusal to dismiss the Auditor.

22. Due to the Petitioners warranted complaints concerning his misconduct, the Auditor began to act toward the Petitioners in an extremely biased manner, that has continued to this day.

23. This non-befitting behavior resulted in repetitive denials of the Petitioners "substantive and procedural due process rights" and their "rights to private property". He also denied them full evidentiary hearings on the Surcharge (Beneficiary) Claim and the Non-Consenting Beneficiaries exceptions to the '92 account, and, further issued a Report that erroneously dismissed these Motions, exceptions, etc., due to the lack of evidence. This is not so, for even though the Petitioners were denied full evidentiary hearings, the existing Record contains more than adequate proof to substantiate these matters.

24. The Auditor also refused rulings on the closed issues (Consenting Beneficiaries exceptions to the '86 and '92 accounts and the Trustee's Request for Fees), and further refused the Petitioners request for a Court Docket, since no Court Docket exists from 1980 to 1993, see Exhibit N-1 attached hereto). A Court Docket is extremely crucial and necessary to support the Surcharge Claim, prior to addressing the Surcharge Claims.

25. In the spring of 1993, the Auditor took all of the Court Records pertaining to the Trust litigation (1980 through 1993) from the Courthouse, see Exhibit N-2 attached hereto; and, to the knowledge of the parties hereunder, has kept them in his sole possession to this date. He further, on more than one occasion, has denied the Petitioners access to these Records.

26. The Auditor's constant actions and inactions (refusal to provide a Court Docket, full evidentiary hearings, and rule on the closed and precedent issues) forced the Trustee to file in 1995, various Motions requesting that the Court provide an adequate Court Docket, rulings on all closed issues, full evidentiary hearings on the Surcharge Claim and the Non-Consenting Beneficiaries' exceptions to the '92 account, and the dismissal of the Auditor, citing to 101 well

documented allegations in support of the his dismissal, etc. (see Exhibits 1, 2, 3, 5, 7, 8, 8-B, 8-C, 8-D, and 10 of the Mandamus Complaint, Exhibit E attached hereto).

27. To this date, the Orphans' Court (Defendant) has refused to rule on these motions, memorandums, etc., and this inaction has resulted in the severe denial of the Petitioners "rights to due process", as is afforded them under the 5th and 14th Amendments of the Constitution. This has resulted in the unjust taking away of their (substantial) "rights to private property"; and, by failing to rule thereon, no appellate rights exist. Accordingly, the Petitioners were forced to file the Mandamus Complaint (see Exhibit E attached hereto) in the State Supreme Court. This Complaint, with its numerous attached exhibits, clearly evidences the allegations contained herein.

28. "Due process rights" are the rights of every citizen of these United States. They form the basis of this Nation, and are, the very rights and privileges that our forefathers so gallantly shed their blood for, and sacrificed their lives for. Needless to say, this Nation was founded to stop the English tyranny of the so called "Courts of Star Chamber ", that unjustly imprisoned its citizens and took away their "rights to property", without even as much as a trial.

29. "Due process" once denied may never be capable of adequate restoration. That is why the U. S. Supreme Court awarded "full evidentiary hearings" to the welfare mothers in the case of Goldberg v. Kelly, 397 U. S. 254, 90 S.ct.1011, 25 LE 287 (1970), see Exhibit W-3 attached hereto, after their welfare payments had been taken away from them without even as much as a hearing.

In addition, the Wyoming Supreme Court In Re French's Estate, Id 351 P. 2d 548, at 594-595 (see Exhibit 8B-K of the Mandamus Complaint, Exhibit E, attached hereto), in a case which involved, together with other issues, the dismissal of an executor for alleged misconduct together with his failure to make a required inventory; the Appellate Court held that the executor could not be dismissed without a hearing, for in so doing he was deprived of his "due process" rights. In that case, there was a rejected "Offer of Proof" and a denial of the party's right to a hearing by the lower Court, as is true of our case. The French's Estate case, supra, applied Federally protected Constitutional "rights to private property" against private persons.

The only difference between the French's Estate case, supra, and the In Re Bushman's Estate, 123 CA. 2d. 546, 267 P. 2d 73 (Dist. Ct. Of Appeal, 2nd Dist Div.3 1954), see Exhibit 8B-J of the Mandamus Complaint, Exhibit E, attached hereto, is that in the French's Estate case, there was no hearing at all provided, while in the Bushman's Estate case (involving the same issue), there was an inadequate hearing. However, even if the cases differentiate between no hearing and an inadequate hearing, (in our case, the hearing on the Surcharge (beneficiary) Claim was less than one half hour. This hearing on a twelve year matter was, in essence, no hearing at all. There were no hearings afforded on the Non-Consenting Beneficiaries' exceptions to the '92 account, and on the numerous Motions regarding the dismissal of the Auditor, the exceptions to the Auditor's Fees, and other matters involving denial of the Petitioners' "due process" rights, etc. Both of these cases are cited to in more detail in the Mandamus Complaint filed with the Pennsylvania Supreme Court (see Exhibit E attached hereto), and will be addressed further in the brief to be filed, should this Honorable Court accept this Mandamus Petition.

30. In the corresponding Memorandum to the Motion for Full Evidentiary Hearings on the Surcharge Issue and Offer of Proof Regarding Same (see Exhibit 8B of the Mandamus Complaint, Exhibit E attached hereto) filed on June 27, 1995, Trust co-Counsels cite to a line of U.S. Supreme Court cases, starting with Goldberg v. Kelly, supra, see Exhibit W-3 attached hereto, that held that "procedural due process" under the U.S. Constitution is denied unless a petitioner has been afforded the right to a predetermination hearing, in which the petitioner could present evidence, orally testify, and/or confront or cross-examine witnesses. Hence, actual hearings are essential to the protection of "procedural due process" rights.

31. The case at issue, our case, presents a unique question that has only been dealt with by two states, California and Montana. While it is clear from the U. S. Supreme Court cases that "procedural due process " for purposes of awarding state, federal payments, or other governmental benefits requires full adherence to "procedural due process" under the Fifth and Fourteenth Amendments of the U. S. Constitution, do these rights not equally apply when state and/or federal benefits are not involved, and when private parties' rights are taken away by action or inaction of a Court?

32. These cases, (cited to in the original Mandamus Complaint, see Exhibit E attached hereto, and fully explained and developed in the Petition for Rehearing, see Exhibit K attached hereto) show, that as State governments seek to regulate more of people's rights and lives, this issue will arise over and over. Thus, the State Supreme Court should have more thoroughly considered and discerned the serious matters involved in the Complaint before denying the Complaint in a Per Curiam decision, in which for some unknown reason, the Court ordered that the Judge's name to be stricken from the caption of the case, all the while, never addressing the serious content of the Complaint.

33. In the case of In re Bushman's Estate, supra, (a copy of which is attached as Exhibit 8B-J to the Mandamus Complaint, Exhibit E attached hereto, being that a State Court may not have had out of state cases, reporters, readily available to it), the California District Court of Appeal (the intermediate Appellate Court similar to the Pennsylvania Superior Court), held, in a case, involving a factual pattern somewhat similar to our case, that an executor of an estate could not be removed without a fair and adequate hearing (a hearing lasting for a full day, part of which, the party did not have counsel present). At the continuation of the hearing in the Bushman's Estate, and when the party was again represented by counsel, the Court refused to admit an "Offer of Proof", as the Defendant has refused to do so in our case when it was submitted (as to be proposed in the full evidentiary hearings thereon) in detail in pages 12-15 in the Memorandum to the Motion for Full Evidentiary Hearings on the Surcharge Issue and Offer of Proof Regarding Same (See Exhibit 8-B of the Mandamus Complaint, Exhibit E, attached hereto).

34. The four (4) page "Offer of Proof" housed in the Trustee's Memorandum was intended to show the Court specifically the evidence that was be to presented and the various witnesses that would testify in support of the involved Surcharge Claim. These parties had never testified before the Court and/or the Auditor; and, accordingly, neither the Court, nor the Auditor had the opportunity to view their demeanor.

35. The Mandamus Complaint, cited to eight (8) bases upon which Mandamus was being sought. Included in the Complaint was the all important fact that the Orphans' Court failed to rule on the numerous motions before it and had denied full evidentiary hearings on the serious issues discussed herein; thereby, denying the Trustee,

the Non-Consenting Beneficiaries, and the former Trustees (Raymond and Nevin) their rights to "procedural and substantive due process".

36. On January 10, 1996, the Supreme Court issued a Per Curiam Order (See Exhibit F, attached hereto) granting Attorney Boswell's Application to Intervene on behalf of the Non-Consenting Beneficiaries; but, denied the Mandamus Complaint, the Application for a Stay, and the Complaint for Intervention without rendering a legal opinion as to why it was denying the serious and well documented issues raised in the Complaint.

37. A Petition for Reconsideration was filed by Trust co-Counsels on January 17, 1996 with the State Supreme Court; a copy of which is attached hereto as Exhibit K .

38. On January 24, 1996, nine days after the deadline (established by the June 30, 1995 Order of Judge Quigley for filing such a Report) had passed, the Auditor filed his Report on all issues, including the Surcharge issue and the Non-Consenting Beneficiaries exceptions to the 1992 account that had not properly been adjudicated since evidentiary hearings had not been held. Furthermore, he filed this Report while the Trustee's Petition for Reconsideration was still pending before the Supreme Court.

39. The Auditor filed his Report in an improper, incomplete (missing several pages and referenced to exhibits) manner, and without proper service on all parties involved, including those Beneficiaries not represented by counsel; and, in violation of the local Rules of Procedure as set forth in Rule 1009 (f) of the Local Court Rules of Juniata and Perry Counties promulgated and signed by Judge Quigley, as set forth in Exhibit B attached hereto.

40. The requirements for this Court to grant Mandamus, pursuant to F.R.A.P, Rule 21, is that the Petition for Mandamus should contain:

(1) A statement of the facts necessary to an understanding as to the issues presented by the Application;

(2) A statement of the issues presented and the relief sought;

(3) A statement of the reasons as to why the

writ should be issued; and

(4) Copies of any Order(s), Opinion(s), or essential parts of the Record.

41. Regarding #(1) cited to above, the voluminous facts and documented allegations herein clearly demonstrate the reasons as to why this Application has been presented. In the essence of time, when drafting the facts enumerated above, all eight (8) of the specific bases for Mandamus were not completely and thoroughly discussed. Reference to these eight bases was made on page 11 of the original Mandamus Complaint (See Exhibit E attached hereto). Counsels and the Petitioners herein respectfully and sincerely apologize for the length of these exhibits due to the convoluted nature of these matters (which is due to the Court and the Auditor's actions) that are addressed in the Complaint. The exhibits attached hereto are necessary and crucial in support of the complaints housed in the Mandamus Action, as well as the various other actions, of the Defendants cited to herein, over the course of the last sixteen years. All eight (8) bases are reinstated in their entirety in the following paragraphs.

42. In the eight (8) specific bases listed below, there are shown situations in which the Defendants (Judge Keith B. Quigley and Daniel Stern) have failed to afford "due process" to the current Trustee, the former Trustees, and the Non-Consenting Beneficiaries. The Petitioner Trustee herein is the successor in interest to the former Trustees, and as such she succeeds to the interests of the former Trustees to the dates that they resigned and/or were treated by the Orphans' Court as having resigned. Accordingly, she can bring an action on their behalf as to their "due process rights" that were violated up to those dates.

(1) The Orphans' Court, through the Judge and the Auditor, denied rulings and evidentiary hearings on the Motion for Full Evidentiary Hearings on the Surcharge Issue and Offer of Proof Regarding Same as per the attached Memorandum (see Exhibits 8 and 8-B of the Mandamus Complaint, Exhibit E, attached hereto) filed on June 27, 1995.

The hearings that were denied to the Petitioners were necessary to protect their "procedural and substantive due process rights", and, were extremely crucial in substantiating and supporting their Surcharge (beneficiary) Claim and the exceptions (Non-

Consenting Beneficiaries) to the 1992 account; and, in creating a Record thereon. The denied ruling on the Motion for Full Evidentiary Hearings on the Surcharge Issue and Offer of Proof Regarding Same is the most important of all the necessary rulings. This matter is dealt with more fully in the original Mandamus Complaint, see Exhibit E attached hereto.

(2) The Defendants (the Judge and the Auditor) denied rulings and evidentiary hearings on the Motion to Dismiss the Auditor for Cause and attached Memorandum (See Exhibit 8-C and 8C-A of the Mandamus Complaint, Exhibit E) filed June 27, 1995, citing to 101 well documented allegations of misconduct, negligence, and biases on the part of the Auditor.

The Defendant (the Judge) has refused to rule on this Motion, and in so doing, he has violated the Non-Consenting Beneficiaries' and the Trustees' "rights to due process", and, hence has taken away private property without "due process of law".

(3) The Orphans' Court and the Auditor denied rulings on the closed issues of the Consenting Beneficiaries' exceptions to the 1986 and 1992 accounting and the former Trustee's (Raymond E. White's) Motion for Payment of Fees, etc. These requests were housed in the Motion to Postpone Hearings and Dispose of Outstanding Matters (see Exhibit 1 of the Mandamus Complaint attached hereto as Exhibit E) filed on January 18, 1995. In the conservation of judicial time and legal expenditures thereon, these closed matters should have been ruled on prior to addressing the Surcharge (beneficiary) Claim. In addition, the requested rulings on the Trustee's Motion for Request of Fees, (that also was a closed matter), should have been ruled on prior to holding evidentiary surcharge hearings as these fees as they were relative and a direct by product of the Consenting Beneficiaries' protracted litigation against the Trust and it's Trustees. This Request for Fees only arose because the prior Trustee (Raymond) was forced to serve as sole Trustee past his original agreed upon term, in the Trust Agreement (March 21, 1992), without compensation.

(4) The Court denied rulings on the request for a Court docket, that was also housed in the motion cited to in number (3) above. No meaningful, accurate Court Docket (listing of all applicable motions, exceptions, objections, orders, etc.) is available. Nancy Lebkicher, Clerk of the Orphans' Court in her correspondence

of November 7, 1994 attested to this fact, I. e. no Court docket encompassing the years 1980 to 1993 (see Exhibit N-1 attached hereto). A proper and accurate Court Docket is crucial to the preparation, presentation, and substantiation of the Surcharge (beneficiary) Claim. The current Trustee is still in the process of compiling the docket; and it is almost complete. It has taken her two years, and she has done so, by cross referencing the prior Trust Counsels' and the prior Trustees' voluminous files with the existing Court Records. During the time she was compiling this information, she found many discrepancies and missing documents within the existing Record. In fact, there were substantial discrepancies in the Court Records from her two separate viewings of the Records in the spring of 1994 to the spring of 1995, see Exhibits C , D, and Q attached hereto.

The Defendants violated the State Procedural Statutes under Rule 1009 that emphatically states that it is the responsibility of the Court, the Auditor, and the Clerk of the Court, and not the Petitioners, to keep accurate records of all proceedings, petitions, etc. brought before it. In light of the absence of a Court Docket and the Defendants' refusal to provide one, the Petitioners herein have been denied "procedural and substantive due process rights".

(5) The Orphans' Court denied rulings on the Petition for Withdrawal and Second Rehearing on the Payment of Auditor's Fees (see Exhibit 7 of the Mandamus Complaint, Exhibit E, attached hereto). The Plaintiff has never had her day in Court, and substantial "property rights" of the Trust and its beneficiaries have been unjustly taken away without any hearing or ruling. The Auditor has erroneously received his money, and no appeal right presently exists.

(6) The Defendant has denied rulings on the Motion of Appeal of the Auditor's Order of March 22, 1995 Denying the Extension of Time to Respond to the Auditor's Memorandum of January 25, 1995 (see Exhibit 2 of the Mandamus Complaint, Exhibit E, attached hereto). The Defendant has totally ignored the existence of this Appeal in his Order of June 30, 1995, and even to date. A ruling on this matter is necessary to fix a realistic and meaningful schedule in order to present the relative material on the Surcharge Claim (cost, damages, etc.) to the Court.

(7) The Defendant and the Auditor denied rulings on the Trust co-Counsels' Reply And Memorandum of Law to opposing

Counsel's untimely (over one year late) Answer to the Trustee's Motion to Surcharge Beneficiaries. Trust co-Counsels' Reply to the Answer to the Trustee's Motion to Surcharge Beneficiaries pointing out that numerous misstatements of fact and law were housed in opposing Counsel's untimely Answer. Trust co-Counsel, Mr. Mirin, in the hearing of January 25, 1995, moved to strike the opposing Counsel's untimely Answer (filed January 23, 1995) to the Trustee's Motion to Surcharge Beneficiaries (filed December 16, 1993). The Auditor refused this request. Even if the Court would refuse to dismiss the Answer for untimeliness, it properly should be barred by laches. In addition, the Answer is still unfounded in law and accordingly should be stricken from the Record. The Defendant herein should answer the Trustee's Reply and Memorandum of Law; and further give guidance concerning the need for clarification and amendment of the Surcharge Motion in order to properly dispose of the Surcharge (beneficiary) Claim matters. Once again " due process " has been violated to the Petitioners herein.

(8) The Defendant denied rulings on the lack of response by opposing Counsel to the Trustee's Memorandum of Law in support of fees, filed on December 20, 1993, which also cited to the tax consequences of a cash final distribution versus that of a land distribution at Trust termination. The various points, as set forth in the Memorandum of Law, that demonstrated that the Trustee was entitled to the fees, coupled with opposing Counsel's failure to reply to the Memorandum, it is contended, constitutes an admission of the facts and the case laws cited to therein, and this fact accordingly, should deem the Trustee's Motion for Request of Fees sustained. This fact, again, demonstrates the Auditor's denial of substantial "due process rights" to the prior Trustee. The Defendant has refused to address these issues and rule on them; and in so doing, he has further denied the prior Trustee his "rights to due process", and hence, his "rights to private property" (Trustee's fees).

In summary, since September of 1994, all eight (8) of the above issues have been presented to the Defendant and/or the Auditor with repeated requests for evidentiary hearings and rulings thereon. It should be also noted that these rulings are and were necessary (as cited above), and were adequately briefed, and well documented to, in the voluminous exhibits attached thereto for the Court.

43. The facts presented herein are combined with allegations, in that they are necessary to support the other actions

cited to in this Petition, due to the protracted nature of this case, these facts and allegations may be unusually long. Counsels and the Petitioners hereunder, once again, sincerely apologize to this Honorable Court for the length of this Petition, the number of paragraphs herein, and for the voluminous exhibits attached hereto. We have attached these exhibits as a courtesy to this Honorable Court, only in an effort to aid you in your research and documentation of the numerous facts and allegations cited to herein.

44. The second (#2) of the Requirements necessary for this Court in issuing Mandamus, are set forth in allegations #40 and #41 above, which is a statement of the issues presented and the relief sought. The first of these issues, #(1), the Surcharge (beneficiary) Claim was adequately presented in the above allegations, prior to herein, in which the question was asked, . . does federal "due process" apply to private litigants who bring actions against other private litigations, where funds and/ or benefits, that are not under either state or federal law, are involved?

45. As to the relief sought, Counsels hereunder, as is stated above, desire that the Orphans' Court be directed to answer all presently pending Motions, and, that "full evidentiary hearings" be afforded the Petitioners herein with regard to the Surcharge (beneficiary) Claim, the Non-Consenting Beneficiaries' exceptions to the 1992 account, the Motion to Dismiss the Auditor for Cause, and all pending motions before the Orphans' Court, prior to the Court rendering its Order(s) thereon. Furthermore, a Court docket must be prepared before the Orphans' Court, or the Auditor who has already issued his Report, or any Court can adequately rule on the Surcharge (beneficiary) Claim. Accordingly, this Honorable Court should direct the Defendant to compile an accurate Court Docket, afford full evidentiary hearings to the Petitioners herein, and rule promptly on those issues after they have been fully briefed by all parties involved, providing that the Court can do so in a non-prejudicial manner.

46. The third (3d) element necessary for the issuance of a Writ of Mandamus by this Honorable Court, is set forth in allegation # 42 above, is a statement citing to some of the reasons as to why the Writ of Mandamus should be issued. Although these have been stated in detail in the proceeding allegations herein and in the Original Mandamus Complaint, they will be restated briefly. The failure of the Defendant (the Orphans' Court) to rule on the closed issues (the Consenting Beneficiaries exceptions to the 86 and 92

accountings and the former Trustee's request for fees, etc.), the failure of the Defendant to provide an adequate and accurate Court docket, the failure of the Defendant to rule on the various and numerous Petitions before it, and the Defendants failure to hold "full evidentiary hearings" on these matters, prior to allowing the Auditor to issue his "rush to judgment" Report is in violation of the Petitioners' "procedural and substantive due process rights".

47. The fourth (4th) element necessary for the issuance of a Mandamus Writ by this Court, as set forth in allegation # 40 above, under F.R.A.P. Rule 21(a), are copies of the Motions, Orders, Memorandums, etc. that are essential parts of this Complaint. These Motions, Orders, etc. are attached hereto as exhibits.

48. In the reorganization of the Federal Court system occurring in late 1988, Mandamus actions were severed from the jurisdiction of the Federal District Courts to the Circuit Courts of Appeal. However, the annotated cases, under F.R.A.P. Rule 21 (a), see Exhibit W-8 attached hereto, have held that although the District Court is prevented from issuing Mandamus as such; it does have the power to issue the equivalent District Court Order necessary to achieve the same result as a Mandamus Order.

49. The Writ of Mandamus sought herein is from a final Pennsylvania Supreme Court Order, not a Federal Court Order. It is coupled with other actions (to be shown below) that allow either a Federal District Court or this Honorable Federal Third Circuit Appeals Court to act.

50. Unfortunately, the annotated cases, under the pertinent Federal Rules of Appellate Procedure (noted above), do not cover this unusual type of complex Trust case, in describing the nature of actions that the Federal District Court may take in lieu of the Mandamus Writ.

51. These annotated cases deal only with issues involving improper actions by federal administration agencies, and in other types of Federal actions, not State actions.

52. The Civil Rights Act of 1871, which has been codified into 42 U. S. C. A. s.s. 1983 provides that:

"Every person, who under color of a statute, ordinance,

regulation, or usage, of any state or territory or the District of Colombia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution or laws shall be liable to the party injured at law, suit in equity, or another proper proceeding for redress"

53. In the Bushman's Estate case supra, Exhibit 8B-J of the Mandamus Complaint, Exhibit E attached hereto, as referred to on page 48 of the Memorandum in Support of Full Evidentiary Hearings, see Exhibit 8-B of the Mandamus Complaint, Exhibit E, attached hereto, the executor appeared in Court on an order to show cause why he should not be removed for alleged misconduct and the failure to file an inventory of the estate within the three month period after his appointment prescribed by law. At the initial hearing, evidence was presented as to the executor's mental condition, and in chambers the Judge attempted to have the executor resign. The executor refused to resign, then, and later, in open Court, after his counsel was dismissed.

At a continuation of the hearings, when he was once more represented by counsel (newly appointed), the Court refused to admit the executor's "offer in proof".

After denying the "offer of proof", the trial Court removed the executor. In overruling the trial Court, the California Appellate Court, states, in pertinent part, on page 84:

"The fundamental conception of a Court of justice is condemnation only after notice and hearing. No one may be deprived of anything which is his to enjoy until he shall have been divested thereof by and according to law. Under the constitutional guaranties, no right of an individual, valuable to him pecuniarily or otherwise, can be justly taken away without its being done conformably to principles of justice which afford "due process" of law, unless the law constitutionally otherwise provides. "Due process" of law does not mean according to the whim, caprice, or will of a Judge, [Matter of Lambert, 134 Cal 626, 632-633, 66 P. 851, 55 L. R. A. 856 (86 Am. St. Rep. 296),see Exhibit W-6 attached hereto], it means according to law. It excluded all arbitrary dealings with persons or property. It shuts out all interference not according to established principles of justice, one of them being the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with

evidence. Massachusetts Ins. Co. V. Industrial Acc. Comm., 74 Cal. App.d 911, 170 P. 2d 36, see Exhibit W-14 attached hereto. [Emphasis added]. The Court goes on to provide, in pertinent part:

"The power vested in a Judge is to hear and determine, not to determine without a hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated. To Judge in a contested proceeding implies the hearing of evidence from both sides in open Court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a Judgement accordingly. " [Emphasis added]

It is the last quoted paragraph of the Bushman's Estate case, cited above, that best describes the " due process " that the Petitioners are seeking. They desire an open hearing in which both sides can present witnesses, cross-examine those witnesses, and present evidence thereon; and, from that consideration, a conclusion can be made as to where the truth lies, and only from those considerations can a fair judgement be rendered. Constitutional "due process" requires it, and the Defendants should uphold these Petitioners' rights to it.

The previously cited holding of the case of In Re Bushman's Estate, supra, is cited by the Montana Supreme Court in the case of In Re French's Estate, 137 Mt. 347, 351 P. 2d 548, 594-595, (1960), a copy of which is attached hereto as Exhibit K.

In the French's Estate case, supra, this case involved the question of admission of a holographic will to probate. However, one of the issues discussed in the dicta of the French's Estate case, supra, involved the dismissal of an executor by the Court without a hearing, while in the Bushman's Estate, supra, case, there was an inadequate hearing. In the French's Estate, case, supra, the reason for the dismissal was the alleged misconduct of the executor, coupled with the failure to file an inventory. Summarily, in the French's Estate case, there was a rejected "offer of proof" and the denial of full evidentiary hearings by the lower Court, as is true of our case with

Surcharge Claim; and, in the Bushman's Estate case, the was no hearing afforded, as is also true of our case concerning the denial of evidentiary hearings on the Non-Consenting Beneficiaries' exceptions to the '92 account, and the numerous other motions cited to above in allegation # 42.

It should be further noted that Justice Adar, in the dicta in the French's Estate case, 351 P. 2d. id at 595, repeats the "due process" clauses of the In Re Bushman's Estate case, supra, quoted above. He states, in pertinent part, on page 595:

"The constitutional right to notice and hearing cannot be taken away in the fashion that was attempted in the present case. The Judge's conception of his duty was entirely erroneous. The plainest principles of justice required that the appellant be given notice of the specific charges against him. No notice was given him that he was to be removed on the ground that he was so mentally deranged as to be incompetent to act as executor. . . . He had no authority or power, without notice or hearing, to remove him. The Appellant was not only not accorded a just, fair, and impartial hearing; he was not accorded the right or opportunity of any hearing, either on the charge that the inventory was not filed in time, or on the ground, not charged, that he was so mentally deranged as to be incompetent to act as executor. No legal evidence was produced that he was incompetent to act. He was denied the opportunity of presenting any evidence. His offer of proof was erroneously rejected. In short, he was denied "due process" of law." [Emphasis added]

In conclusion, the Petitioners herein have been denied, as in the above cited cases, their "substantive and procedural due process rights", and hence , their "rights to private property". These rights are afforded to them under Constitution, and should not be denied them by the very officers of the Court that have sworn to uphold them, I. e. the Defendants. Accordingly, the Petitioners herein respectfully request the intervention of this Honorable Court to insure that the Petitioners' inalienable rights to "due process", and hence their "rights to private property" are properly afforded to them, as is their right and privilege under the Constitution, and not under "the whim, caprice, or will of a judge", Matter of Lambert, 134 Cal 626, 632-633, 66 P. 851, 55 L.R.A. 856 [86 Am. St. Rep. 296], see Exhibit W-6 attached hereto. "Due process" is the right of every citizen as is so amply stated in the case cited to above,

Massachusetts Ins. Co. V. Industrial Acc. Comm., 74 Cal. App.d 911, 170 P. 2d 36, see Exhibit W-14 attached hereto, in which the Appellate Court states that, "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. . . To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgement accordingly."

IV
COMPLAINT

Pursuant to 42 U.S.C.A. ss 1983, the above Petitioners bring action against (1) Judge Keith B. Quigley, as President Judge of the Orphans' Court, Court of Common Pleas for Juniata and Perry Counties, State of Pennsylvania; and, (2) Daniel N. Stern, Esq., Orphans' Court appointed Auditor (appointed by Judge Keith B. Quigley) to hear Objections to the 1986 and 1992 accountings of the C. A. White and Flo B. White Trust (and other matters incident thereto) for violation of the Petitioners herein "due process" rights.

This action is brought under Count I, against the officials in their Judicial and Auditor capacity, and under Count II in their individual capacities for violation of the constitutional "due process" rights of the present Trustee, the Former Trustees, and the Non-Consenting Beneficiaries.

The Present Trustee, NANCY WHITE VENCIL on behalf of herself, the former Trustees, and the Non-Consenting Beneficiaries through Counsels, hereby brings this action for violation of their "due process" rights under 42 U.S.C.A. ss 1983, and alleges as follows:

1. The factual allegations set forth above are incorporated herein and shall serve as a basis for this action in violation of the Petitioners "due process rights".

2. Pursuant to 42 U. S. C. A. Section 1983 [a copy of which is attached hereto as Exhibit W-4], any person who under color of any statute, ordinance, regulation, or usage, of any State, or territory, or the District of Columbia, subjects or causes to be subjected any citizen of the United States or any other person within

the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or any other proper proceeding, for redress.

3. In Hafer v. Melo, 502 U.S. 21, 112 S. Ct. 358, 116 L Ed 301 (1991) (see Exhibit W-11, the United States Supreme Court held that such actions under 42 U.S.C.A. 1983, could be brought against State Officials, both in their official and individual capacities.

4. The Defendant, Judge Keith B. Quigley ("Judge Quigley"), is President Judge of the Courts of Common Pleas (which includes the Orphans' Court). As such he is responsible for the administration of the Court and the Records of the Court. In addition, he supervises and has control over all of the financial accounts (including the escrow or trust account) of the Court.

5. Judge Quigley is responsible, under law, for supervising the activities of the Co-Defendant, the Auditor, Daniel N. Stern.

6. The Defendant, Daniel N. Stern, is the Court appointed Auditor for the 1986 and 1992 accountings (and other matters incident thereto) of the C. A. and Flo B. White Trust. Pursuant to Rule 1009 (b) of the Juniata and Perry County Local Rules of Court Procedure (a copy of which is attached hereto as Exhibit B), the Auditor is responsible for keeping true and complete records of all matters coming within his jurisdiction. In addition, since he serves in a quasi-judicial capacity, he is responsible to oversee the proper return of any records of the Court that are removed from the files at the Courthouse, either by him, or those whom he supervises.

7. Accordingly, the Defendant, Judge Quigley, is responsible for overseeing Nancy Lebkicher, Clerk of the Orphans' Court, so that the proper rules of procedure are maintained and an accurate and complete Court Docket of all matters before the Orphans' Court are kept therein. All papers filed with the Court (under the normal rules of Court procedure), are to be indexed and available during Court hours for inspection by all parties to the litigation, as well as the public. In this case, there is no adequate Court Docket (encompassing thirteen of the sixteen years of litigation), see Exhibit N-1 attached hereto, and the Records, in their

entirety, have been removed from the Court and held in the sole possession of the Auditor.

8. The present matters before the Orphans' Court involve over nine (9) years of continual hearings, motions, exceptions, and numerous other matters pertaining to the C. A. and Flo B. White Trust. The papers that should have comprised the Court Docket and that have been filed with the Court Record encompass many volumes of documents, devoid of a formal itemized listing, pertaining to the various issues involved in the matters before the Orphans' Court, many of which involve the denial of "substantial property rights" to the Petitioners herein.

9. To summarize the facts in paragraphs #1-55 above, as pertaining to a 42 U.S.C.A. 1983 action, the Judge and the Auditor, have consistently denied the Petitioners hereunder their Constitutional "due process rights" by failing to provide an accurate Court Docket (see Exhibit N-1 attached hereto) and Records thereon, thereby making it impossible for the Petitioners herein to adequately present issues to the Court; in particular, the Surcharge Claim brought both by the Non-Consenting Beneficiaries in their exceptions to the 1992 account and the former Trustee (Raymond White) in his Motion to Surcharge Beneficiaries.

10. This failure to keep a Court Docket and Records thereon was repeatedly pointed out to the Judge and the Auditor; and, nothing has been done to remedy the situation, or attempt to comply with the law. Specifically, Motions were continually filed with the Auditor and the Court for a proper Court Docket, so that the Petitioners could properly proceed on their Surcharge Claim; and, the Court to date has refused to rule on these Motions.

11. In the Spring of 1995, the Trustee formally excepted to the validity and propriety of the of the Auditor's Request for fees. The present Trustee, after having been denied evidentiary hearings on her warranted exception, paid these monies (under protest) into the escrow of the Orphans' Court. The Judge (in violation of state law), ignored the instructions of the present Trustee, who upon the transferring of these assets into the escrow account of the Court, stated that they should be held in the escrow until either released by the Trustee, or by a higher Appellate Court after hearing the case (since the Defendant erroneously refused to do so) and rendering its final decision, and, ordered the Clerk of Orphans' Court to pay the

Auditor out of this escrow account without affording the Trustee a hearing on her valid exceptions to the Auditor's fees. In short, the Auditor's negligence, ineptitude, and bias had caused greater financial losses to the Trust, in needless litigation fees, than the amount of fees that he was seeking to be paid for. The Judge, in ordering these fees paid, without a hearing on this issue, again denied "substantive and procedural due process rights" to the Trustee.

Count I

As to the actions against the Defendants in their State functions, the following causes of action exist.

A. As to the Judge.

1. The Judge is a judicially appointed officer of the State of Pennsylvania, and as the President Judge of the Court of Common Pleas of the 41st Judicial District of the State of Pennsylvania, he is required to properly supervise the administration of his Court, it's officers, and employees.

2. Judicial immunity does not protect judges in the performance of their administrative functions Forester v. White, 484 U.S. 219 (1988), see Exhibit W-9 attached hereto. In order for the challenged conduct of a judge to come within the purview of judicial immunity, the conduct must clearly be a judicial act, Stump v. Sparkman, 435 U.S. 349 (1978), see Exhibit W-10 attached hereto. The acts of the Judge cited herein occurred due to his actions and inactions in performing administrative functions not judicial acts.

3. The Judge by denying the Plaintiffs a complete and accurate Court Docket, from which to defend and support the Surcharge (Beneficiary) Claims, failed to afford the Petitioners herein their constitutionally protected "due process rights" to collect on potentially millions of dollars worth of costs, damages, etc. (as well as payment for services rendered, by the former Trustee, Raymond White), that were all a direct result of the unwarranted litigation brought against the Trustees by the Consenting Beneficiaries.

4. Furthermore, the Judge, in causing the Auditor to be paid from funds of the escrow of the Court, in violation of the conditions set forth by the Trustee, who had deposited the monies into

the escrow account of the Orphans' Court, violated state procedural statutes, thereby taking away the Trustee's and the Beneficiaries' rights to property, which is clearly in violation of their "due process rights".

5. The Judge violated the Petitioners rights, due to his apparent dislike for the prior Trustee, Raymond White; and, especially the present Trustee (who was so vocal in voicing her displeasure at the Auditor's negligence, ineptitude, etc.), as evidenced in the various hearings. When asked to dismiss the Auditor from the case, the Judge refused to do so.

6. Judge Quigley, the Defendant herein, in his Order of June 30, 1996, (a copy of which is attached hereto as Exhibit 8D-A of the Mandamus Complaint, Exhibit E), clearly demonstrated and stated that he did not read the various motions, memoranda, exhibits, and documentation thereon, that had been filed with his Court just 3 days prior, for rulings and determinations on the various issues that had been pending for nine years. He further stated in that Order that he might be "denying some folks due process rights" by issuing his ruling, without addressing or affording the Petitioners herein full evidentiary hearings, but, his reason for doing so was that he was trying to expedite these matters, without denying "due process" to anyone. This improper position evidences his failure to properly carry out his administrative functions as the President Judge of the Orphans' Court, which have caused the Petitioners herein to be denied their rights to "due process" to full evidentiary hearings.

7. The Judge, as President Judge of the Orphans' Court, failed to set up proper procedures for the removal and return of all or parts of the Record to the Clerk's office, by the Auditor. This allowed the Auditor free reign to remove all of the Record, in the Spring of 1993 (see Exhibit N-1 attached hereto). The parties hereunder have reason to believe that the Auditor has kept these Records in his sole possession till this date. The Auditor did so in an apparent attempt to deny the Trustees, and the Non-Consenting Beneficiaries rightful access to the Record. This action caused a potential for loss of the Records, or parts thereof, that may never be replaced, especially in lieu of the absence of a Court Docket. The missing and confused state of these Records are well documented in Exhibit C and D attached hereto.

8. The Judge should not have allowed the Auditor to

remove the entire Record for this long period of time (3 years); for these are public records, and this removal greatly hindered the Petitioners herein from obtaining and having free access to this very information, that was necessary and crucial in establishing an appropriate Record in support of the Surcharge (Beneficiary) Claim.

9. The Auditor, pursuant to Rule 1009 (f) of the Perry and Juniata County Local Rules of Court Procedures, was required to file these Records with his Report. He failed to do so and, although this was pointed out to the Judge in a letter and in subsequent Motions by Counsels hereunder, the Judge did nothing to force the Auditor to comply with this Rule. Accordingly, this too deprived the Plaintiffs again from free access to these valuable documents, in the preparation of their exceptions to the Auditor's Report, once again depriving them of property without affording them "due process" of law.

10. The Judge has repeatedly refused the Petitioners full evidentiary hearings and rulings on their motions, etc. He further denied the all important and necessary rulings on the Motions for Full Evidentiary Hearings on the Surcharge Issue and Offer of Proof Regarding the Same, the Motion to Dismiss the Auditor for Cause citing to 101 well documented allegations as to the Auditor's improprieties (repetitive ineptitude, bias, etc. that needlessly protracted these matters for over nine years), and the Motion requesting a Court Docket and rulings on the closed and precedent issues that were relative to the Surcharge Claim. He further held these motions at bay by refusing to rule on them, and denied the Petitioners evidentiary hearings thereon. Accordingly, he has denied to the Petitioners their "rights to due process", and hence taken away property without "due process" of law, and, he should be held accountable and liable for all damages, costs, etc. resulting to the Petitioners thereon.

B. As to the Auditor

1. The Auditor performed in a quasi-judicial capacity at the appointment of the Judge. Accordingly, to the extent that any of his actions were within the parameters set forth by the Court, any obligations or immunities stemming from such appointment would apply. To the extent that he exceeded his appointment, he would be personally liable.

2. The Auditor, as noted above, was well aware of the lack of a proper and accurate Court Docket, and neither the Judge, nor the Auditor, did nothing to provide and/or aid in the compilation of such a docket. To the contrary, as noted in the allegations noted above and cited to in the Mandamus Complaint, the Auditor removed all of the existing Records in April of 1993 from the Clerk's office (see Exhibit N-2 attached hereto) and kept them in his possession, refusing the Petitioners free access; and, to the best of the Petitioners' knowledge, he has never returned these to the Clerk's office, irrespective of the requirements of Rule 1009 (f) of the Juniata and Perry County Local Rules of Court Procedure.

3. From the few (two) viewings that were finally afforded the Petitioners herein, the present Trustee and paralegal, Mindy Amon, have documented (see Exhibits C and D attached hereto) the fact that substantial parts of the Record were missing when viewed by them in the Spring of 1994 and 1995.

4. Pursuant to Rules 1009 (b) and (f) of the Perry and Juniata County Local Rules of Court Procedure, the Auditor and the Judge are required to keep detailed records of the proceedings before them, and further, file these Records with their reports (i.,e. the Auditor's Report), orders, etc. They have failed to do so, especially the Auditor who filed his Report devoid of a Court Docket and minus his personal notes, that he used in place of the lost transcripts of the hearing of February 24, 1988, since he had failed to order the transcripts, even though he invoiced the Trust for the note-taking. Summarily, the record of that hearing is lost forever, for the Trustees have been informed by the Court Reporter that this note-taking has been destroyed being that it was over 5 years old.

5. The Auditor also refused to create a Record by having a Court Reporter present at the hearing regarding the Road View in Centre County (one of the numerous Consenting Beneficiaries' exceptions to the '92 account); but, finally allowed the current Trustee, after she asserted her rights to do so, to have one present for note-taking at the six hour hearing. The Auditor further issued his Report without obtaining copies of this transcript, for even though the Trustee sent the transcript to be filed with the Court, it was not part of the Record at the viewing in the spring of 1995 (see Exhibit C attached hereto). This fact is further proof in support of the Auditor's refusal to keep accurate records, and thereby, deprives the Petitioners of their rights to "due process".

6. Since the Judge violated the provisions of the escrow (and of the law), by ordering the improper payment of the Auditor's fees from the escrow of the Court, the Auditor should not have accepted payment, since he was a quasi-judicial official, and to the extent that he received funds in violation of the escrow (an account of the Court), he should be held accountable for such improper administration.

C. As to the Judge overseeing the Office of the Clerk of the Court

1. As the duly appointed custodian of the records of the Orphan's Court, the Clerk of the Orphan's Court is responsible under law for keeping an adequate and accurate Court docket of every case, and a proper court Record of all documents filed with the Court. In October of 1992, the current Trustee was first shown the Records, given to the her in various folders full of carelessly thrown about documents and in a non-chronological order do (without even a list of the documents contained therein). This does not begin to comply with the Clerk's responsibility in this regard.

2. The Clerk's office required filing fees for certain papers filed therein, in addition to the fees for the original filings. The fees varied depending upon the length of the documents filed. Part of the reason for these fees is presumably to provide the necessary capital for an adequate staff and facilities in order for the Clerk's Office to keep accurate and adequate records, as is required by law. To the extent that the Clerk's office was paid for these services and failed to render those services, this, in effect, took away property rights without "due process of law".

Accordingly, the Clerk of the Court should have been able to discharge the required duties of her office, as required under the law. In this case, she has failed to do so; and, the Defendants should be held accountable for not overseeing the actions of the Clerk of Orphans Court.

Count II

Personal Actions against the Judge and the Auditor.

1. Due to the shortage of time and the length of this Complaint, these are amply stated in Count I and are essentially the same as the actions against the State. The complete allegations will be supplied in later pleadings, if this Honorable Court deems it

necessary. Since this Court may decide to transfer this part of this action to the Federal District Court for hearing, the pleading would be sent in at that time. Should the Defendants or their Counsels wish these complete allegations in order to prepare their Answers, Counsels hereunder will supply them and will agree to a reasonable extension, not to exceed 30 days, to the filing of their answer.

Alternative Counts I and II.

In the alternative, the Petitioners herein bring action under 42 U.S.C.A. ss 1983 (See Exhibit W-4 attached hereto) against the Judge and the Auditor in their official and personal capacities, for violation of the Petitioners' "due process rights" by reason of the performance of their judicial and quasi-judicial functions respectively and allege as follows:

A. As to the Judge.

1. For the past several years, the Judge has repeatedly failed to rule on numerous Motions, Petitions, and Appeals, before the Court, thereby depriving the Petitioners of their Constitutional rights to both "procedural and substantive due process".

2. Pennsylvania law requires a judge to rule timely on all matters before him. Commonwealth v. Keenan, 347 Pa. 574, 33 A. 2d 244 (1943) (See Exhibit W-12 attached hereto), and the Defendant's failure to do so has deprived the Petitioners of their "due process rights".

3. Primary in this failure to rule, was the Judge's refusal to rule upon a Motion for "full evidentiary hearings" on the surcharge issues (as enumerated in the allegations of the Mandamus Complaint, Exhibit E attached hereto). The right to "full evidentiary hearings" before a decision is rendered is requisite of the federally protected rights of "due process of law" under our Constitution, Goldberg v. Kelly, supra (See Exhibit W-3 attached hereto).

4. The Judge, in prior actions going back as far as the early 80's, (concerning the unsuccessful Petition of the Consenting Beneficiaries to remove the prior Trustee, Raymond White, and their unsuccessful petitions to stop the Bank Trustee from resigning, and their unsuccessful litigation against the Trustees' proposed land division), has caused the Petitioners (and the Trust) to suffer

extensive losses. These losses were not only in unnecessary legal costs; but, were also, losses caused to both the Petitioners private property and the Trust property alike due to the Court's refusal to timely dispose of these matters, (i.e. the Centre County land partition); thereby, causing extensive gypsy moth damages to the timber that was housed on the Petitioners and the Trust timber ground which could not be harvested in time (therefore lost timber revenues were forfeited). These damages are in excess of a hundred of thousands of dollars.

5. Although recent case law does not appear to uphold our position as to the liability of a judge for his judicial actions, nonetheless former case law has held that there is no doubt as to the fact that Congress has the power to impose criminal sanctions upon State Judges for Constitutional violations Ex parte Virginia, 100 U.S. 339 (1879) (See Exhibit W-13 attached hereto). This same principle should equally be applied to civil cases.

B. As to the Auditor

1. The Auditor has failed to properly perform his functions as a Court appointed Auditor. He has constantly delayed hearings on the exceptions to the 1986 and 1992 accountings of the Trust since his appointment in January of 1987, although he is required under section 1009 (c), of the Juniata and Perry County Rules of Court Procedure (a copy of which is attached hereto as Exhibit B), to adjourn hearings for no more than thirty (30) days.

2. A Motion to Dismiss the Auditor for Cause was filed with the Orphans' Court on June 27, 1995, citing to one-hundred and one (101) documented allegations, with attached Memorandum of law, and numerous exhibits supporting his dismissal. This Motion was never answered by the Auditor, nor ruled upon by the Judge. Furthermore, the Judge demonstrated in his Order of June 30, 1995, that he didn't even take the time to read the contents of this Motion or the attached Memorandum, and he has refused to address or rule on this Motion to this day.

3. The Auditor, in the October 6, 7, and 8, 1993 hearings before him repeatedly demonstrated biases toward Ms. Vencil for having been so vocal in complaining about his misconduct (Exhibit 8C-IV of the Mandamus Complaint, Exhibit E, attached hereto) and requesting that the Court dismiss him. The Auditor, on

the second day of the hearings, canceled the third day of hearings for personal reasons and due to an error in his scheduling. He was further attempting to continue the hearing of the second day (October 7, 1993) well into the evening, midnight if necessary. When Ms. Vencil's (then in her capacity as Non-Consenting Beneficiary) Counsel requested that the hearings be adjourned at a normal hour, due to the complications that Ms. Vencil was experiencing with her early pregnancy, the Auditor implied that Ms. Vencil was not telling the truth, and in a hostile tone, demanded that Ms. Vencil produce medical proof to support such a request. This undue response by the Auditor distressed Ms. Vencil and forced her to tears. Shortly thereafter, verification from her physician's office was received, and, only then, did the Auditor reluctantly agree to adjourn at a normal hour. The unnecessary emotional trauma inflicted on Ms. Vencil, as a result of the Auditor's overt biases in those two days of hearings caused the miscarriage (on the following day) of her only child; and is a very unfortunate loss of a human life. Counsels hereunder do not know how to exactly value the loss of a human life, especially that of an only child. Nonetheless, due to Ms. Vencil's advanced age (40's), it is highly unlikely that she will ever become a biological mother, or conceive again. The estimate of such a loss of life would surely be in excess of a million dollars.

4. The Auditor throughout nine (9) years of his proceedings has demonstrated constant biases to the Petitioners herein, (the prior Trustees, the current Trustees, and the Non-Consenting Beneficiaries). This is most evident from his Report, that was recently submitted to the Orphans' Court in which he continually and erroneously finds fault with the former Trustees actions; and, in his hearings. Furthermore, in the Report, as in his hearings, and various Orders that he has issued, he has continually misinterpreted and misstated the facts, the law, and/ or the existing Record to attain a predetermined result, that unduly prejudices the Petitioner's positions.

5. The Auditor's actions of constant delays, have caused the Trust to expend unnecessary sums of money to prepare for hearings and rehearings on the same matter and seek a means in which to ensure justice and afford them "due process"; i.e. numerous motions to Defendant, Mandamus Complaint and Appeal.

Damages

As noted above, the damages caused by the actions of the Judge and the Auditor have caused substantial damages to the Petitioners herein well in excess of a million dollars.

Count III.

Independent Federal Question.

1. In order to bring a Federal Action on Mandamus to the Federal Courts, there must be a independent Federal question. The numerous denials of the Petitioners herein, and the former Trustees rights (the present Trustee having succeeded to their rights), constitute independent questions of violation of the "due process rights" under the 5th and 14th amendments to the U.S. Constitution.

2. It is Counsels' hereunder contention, that there exists an independent action (pursuant to 28 U.S.C.A. ss 1331, see Exhibit W-1 attached hereto), aside from the Mandamus action, for the serious violations, stated herein, to the Petitioners' "due process rights", even before (as far back as the early 80's) the U.S. Supreme Court allowed 42 U.S.C.A., section 1983 cases to be brought before the Federal Courts, as to the misconduct of Court officials in their individual, as well as judicial capacities. This action was not brought before the Federal District Court, for it might have confused the Mandamus issue; and, Mandamus Actions, under F.R.A.P., Rule 21 (See Exhibit W-2 attached hereto), must now be brought before this Honorable Court. The Petitioners herein will abide by this Honorable Court's judgment as to where this action under 28 U.S.C.A. s. s. 1983 should commence.

Count IV.

Removal of the Matters Presently
Before the State Courts to the Federal Courts.

1. The U.S. Supreme Court has determined that where there is a substantial chance, based upon past performance of the State Court that the parties can not obtain "due process" at the State level, then the Federal Court, can transfer the case to the Federal Court.

2. As amply demonstrated herein and in the original Mandamus Complaint (see Exhibit E) above, there is serious questions as to whether the Defendant, will render any Opinion, or

Order, or take any further action, that will afford the Petitioners herein their "due process rights". This is based upon the history of the past several years before this Court.

3. Accordingly, the Petitioners herein respectfully request that the cases before the Orphans' Court be transferred either to this Honorable Court or the Federal District Court to be heard. Once again, in an attempt to avoid confusion of the issues, and show independent federal jurisdiction, this Action is initially brought before this Honorable Court.

IN WITNESS WHEREOF, the parties hereunder request that this Honorable Court, grant Mandamus concerning all of the Motions, Appeals, and Petitions, before it as is stated above; and, in particular the Motions for "Full Evidentiary Hearings on the Surcharge Issues.

In the alternative, if this Court does not issue a Writ of Mandamus, it is respectfully requested that this Honorable Court issue a Stay [of at least ninety (90) days from such Order] of the Orphans' Court's Order, denying an extension of time to hold depositions, file briefs, and answers to the Auditor's Report before it issues its Order thereon.

In addition, the parties hereunder request this Honorable Court to afford such other relief as it may deem equitable.

Respectfully submitted,
By : _____/S/_____
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Florida Bar ID#0487279
Admitted 4/23/96
(as per attached letter)
No Id# issued to date
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APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MAY 21, 1996
C-117

No. 96-7241

THE TRUST OF C. A. WHITE AND FLO B. WHITE
BY NANCY WHITE VENCIL, THE TRUSTEE, Petitioners
v.
KEITH B. QUIGLEY, Nominal Respondent

Present: Greenberg, Cowen and Alito, Circuit Judges

1. Petition for Writ of Mandamus.

2. Clerk's submission for a possible dismissal due to a jurisdictional defect.

3. Response by Petitioners to the Clerk's Letter for possible dismissal due to a jurisdictional defect.

4. Response by Respondents Kathleen N. White, et al., in Support of the Clerk's Letter for possible dismissal due to a jurisdictional defect.

5. Response by Petitioners Nancy White Vencil and the Trust of C. A. White and Flo B. White to the Clerk's Letter for possible dismissal due to a jurisdictional defect and the Clerk's Letter dated 5/7/96 requesting additional information.

6. Response by Petitioners George R. White and Brenda White Vick joining in the Response of Petitioners Nancy White Vencil and the Trust of C. A. White and Flo B. White.

For the Court's information, a copy of the Clerk's 5/7/96 Letter is attached.

_____/S/_____
Anthony Infante 597-3137
Deputy Clerk

ORDER

The foregoing Petition for a writ of mandamus is denied

By the Court,
____/S/____
Circuit Judge

Dated: Jun 04, 1996